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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT E. WHEELER

Petitioner,

vs.

NEBRASKA STATE BAR ASSOCIATION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEBRASKA SUPREME COURT

Petition for Writ of Certiorari

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200 pp

QUESTIONS PRESENTED

I.

WHETHER THE PETITION STATES A CAUSE OF ACTION FOR DEFAMATION?

II.

WHETHER THE PETITION STATES A CAUSE OF ACTION FOR DEPRIVATION OF PLAINTIFF'S CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS?

III.

WHETHER THE PETITION STATES A CAUSE OF ACTION FOR DEPRIVATION OF PLAINTIFF'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL BEFORE A FAIR AND IMPARTIAL TRIBUNAL IMPLIED AND GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS?

IV.

WHETHER THE PETITION STATES A CAUSE OF ACTION FOR INJUNCTION AGAINST THE BAR ASSOCIATION'S FUTURE USE OF THE JUDICIAL PERFORMANCE EVALUATION?

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OPINIONS BELOW

The Nebraska Supreme Court decision affirming the dismissal of the petition is reported at 244 Neb. 786 (1994). The first opinion of the District Court of Custer County, Nebraska is not reported, but is included at Appendix C.

JURISDICTIONAL STATEMENT

The Nebraska Supreme Court issued and filed its opinion on December 23, 1993. Supreme Court Rule 13.1. requires that the present petition for a writ of certiorari be filed within ninety days of entry of the judgment. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

Relevant Constitutional and Statutory Provisions

1. The First Amendment to the United States Constitution:

   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The Fifth Amendment to the United States Constitution:

   No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

3. The Fourteenth Amendment to the United States Constitution:

   Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

In May, 1990 the plaintiff was a County Judge in the State of Nebraska. On May 2, 1990 the Nebraska State Bar Association (hereafter "the Bar") initiated the process of its "NSBA Judicial Performance Evaluation - 1990" (hereafter "Bar survey") of all judges in the State of Nebraska, including that of the plaintiff. The Bar published an "NSBA NEWS RELEASE" on May 2, 1990 in which it stated to the public that it was conducting the evaluation, and that it had a two-fold purpose: to give "voters solid information about the judiciary to help them make informed decisions on judges standing for retention this November," and to give "each judge a report card of his or her strengths and weaknesses." The release went on claim, "To assure valid results, lawyers must base their evaluation on recent, first-hand experience with the judge . . . "

The Bar made no effort to limit the issuance of the survey forms only to those attorneys with recent, first hand experience, but sent the same survey form for evaluation to all its members. It collected responses, and without interpretation of the data obtained, compiled the responses and published the results as received, without regard to the truth or validity of the results received. Of 57 attorneys participating in the evaluation of the plaintiff a minimum of 7 attorneys gave the plaintiff the lowest rating of "very poor (performance is well below average and unacceptable)" in each of the 21 "characteristics" categories. The Bar included in the published evaluation responses that it knew to be false and invalid (paragraph 24).

There appeared in the District where the plaintiff was on the ballot for retention election that fall an advertisement which cited to the results of the Bar survey, and republished portions of the Bar survey.

The plaintiff lost retention election by a margin of 173 votes of a total of 8,861 votes cast. The plaintiff lost his good reputation, his judicial career, and suffered financially.

On June 20, 1991 the petitioner filed in the District Court for Custer County his action for defamation and injunction. The petitioner filed a Motion to Recuse Judge Murphy. After hearing Judge Murphy denied the Motion to Recuse.

The Nebraska State Bar Association ("the Bar") demurred to the petition and Judge Murphy sustained the demurrer.

The petitioner filed his Amended Petition on October 9, 1991. He added as causes of action violation of his constitutional rights under the Fifth and Fourteenth Amendments of the federal constitution and under state constitution. Without a motion to make more definite and certain and without a motion to separately state the causes of action by designation of separate causes, the Bar again demurred and on February 28 Judge Murphy sustained the demurrer, holding that the Bar's claims for its evaluation were mere puffing, although perhaps unartfully stated, and the Bar's publication was protected by the First Amendment of the United States Constitution. Further Judge Murphy held that the issues of deprivation of constitutional rights were not properly before the court, holding,

> . . . Whether or not the Plaintiff was entitled to due process considerations because of the nature of the publisher of the poll is not a question properly before the Court. The Amended Petition sounds in libel, not in a deprivation of constitutional rights. . . .

Judge Murphy did not address the action for injunction.

The petitioner elected to stand on the Amended Petition and the district court dismissed the Amended Petition on March 20, 1992.

The petitioner appealed to the Nebraska Supreme Court. The petitioner raised in his appeal that the publication was not protected by the First Amendment of the federal constitution, and that his rights under the Fifth and Fourteenth Amendments of the federal constitution were violated. He also raised the issue of injunction.

The Nebraska Supreme Court held on December 23, 1993 that the Bar's claims for its evaluation were "hyperbolic", "a permitted exaggeration". It further held that the actions for deprivation of constitutional rights were predicated upon the establishment of a claim for defamation.

> . . . Since he failed to state such an action, it necessarily follows that he stated no other cause of action.

The Court did not address the action for injunction. It therefore affirmed the district court's dismissal of the petition.

This petition for writ of certiorari ensues.

ARGUMENT

I. THE PETITION STATES A CAUSE OF ACTION FOR DEFAMATION.

A. Overview of the Argument:

The vitality of a democratic society is dependent upon an informed electorate. Throughout the country bar associations are conducting judicial surveys under the rationale that it provides a public service of informing the electorate concerning judicial performance.

Petitioner submits that there ought to be some congruence between the rationale of a judicial evaluation and the result produced. The Nebraska Supreme Court held at 796, "There is simply no objective method to determine the ratings an individual judge should receive in any

given performance category . . . "
If a judicial evaluation can have no objectivity, neither can the judicial evaluation have any value to the public, and the rationale for its performance disintegrates.

No court, to the petitioner's knowledge, has set standards for such bar evaluations to assure that they are in fact valid and a true public service. The Nebraska State Bar Association, however, assumed such standards: it publically promised that its evaluation would provide a valid evaluation, solid information to inform the voters.

That promise has significance in two ways. First, the Bar assumed the duty to deliver a valid evaluation representing truthful fact concerning judicial performance of the judges in the state. Second, the Bar assumed the duty to investigate the truthfullness of its assertions, which it otherwise would have no duty to do.

The Nebraska Supreme Court dismisses the promise of the Bar to deliver a valid evaluation as hyperbolic, a permitted exaggeration. Hyperbole is measured from the viewpoint of the reasonable person hearing the representation. See Aisenson v. American Broadcasting Co., infra. The Colorado experience discussed below demonstrates that a valid, informative evaluation can in fact be produced. It is illogical to hold that a promise to deliver the practicable is a permitted exaggeration. Morevor to conclude that the public would know that the Bar did not intend to deliver what it promised implicitly asserts that reasonable persons know that lawyers cannot be trusted to speak the truth.

While it sadly may be true that the public distrusts the legal profession generally, the public reasonably expects that the bar association, itself, knows the law and would not print a lie. Public confidence in the judicial system demands that the public's expectations of responsible service by lawyers as a body be fulfilled, not sidestepped by legal mumbo jumbo.

The Bar promised to produce a valid evaluation but it made not effort to deliver what it promised. It did not evaluate the returns given, and the facts which the bar has admitted in discovery strongly suggest that it knew that its evaluation of the plaintiff was misused by its members and was intentionally malicious and defamatory. These allegations of intentional abuse are ignored by the lower courts.

This case was decided without evidence upon the demurrer of the Bar to the Amended Petition. The lower courts grant the Bar the shield of the First Amendment as though the Bar had no restraints upon its free speech by reason of its judicial connection and purported public service, and as though its promise to deliver a valid evaluation assumed no restraints upon its judgment of the petitioner.

The lawyer and the Bar have immense power under the law and because of their integral connection with it. This holding invites irresponsible and abusive use of that power. New York Times, infra, applies equally to the Bar as to a public figure in the public service.

> For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their

constituents . . .

376 U.S. at 296-297.

Under the allegations of the Amended Petition and this holding, not even intentional abuse of power can be asserted successfully against the Bar, not even when the Bar assumes the duty to conduct a valid evaluation. That is an effective grant of absolute immunity. Such a holding cannot justly stand as controlling precedent. Petitioner respectfully submits this Court should grant certiorari.

B. Pleadings are Liberally Construed for Purposes of a Demurrer.

Pleadings are liberally construed for purposes of a demurrer, the Nebraska Supreme Court held. But it would not permit the plaintiff that same liberality, despite allegations that the Bar knew that its members were using its evaluation as a write-in libel of the petitioner. The case was cut off before full discovery with the sustaining of the demurrer.

C. The Petition Alleges that the Bar Published Defamatory Statements Concerning the Petitioner's Character and Judicial Performance.

The Amended Petition alleges that the Bar's "NSBA NEWS RELEASE" of May 2, 1990 was headed "Lawyers to rate judges' performance," and made the following claims of fact:

1. "The poll gives voters solid information about the judiciary to help them make informed decisions on judges standing for retention this November."
2. "Secondly, it gives each judge a report card of his or her strengths and weaknesses."

3. "Using a scale from one-to-five, lawyers will rate judges on characteristics like knowledge and application of the law, absence of bias or prejudice, efficiency in docket management and patience and courtesy."

4. "To assure valid results, lawyers must base their evaluations on recent, first-hand experience with the judge . . . "

When the results of the defendant's survey are correlated with the key to the score, both of which were alleged, the public would have understood the evaluation results to make the following statements concerning the petitioner's character and judicial performance:

1. That the petitioner was deficient in knowledge and application of substantive law.

2. That the petitioner was deficient in knowledge and application of rules of evidence and procedure.

3. That the petitioner was deficient in ability to perceive factual and legal issues.

5. That the petitioner was biased or prejudiced in civil cases

6. That the petitioner was strongly and inappropriately biased or prejudiced in criminal cases.

7. That the petitioner was strongly and inappropriately influenced by the nature of the case.

8. That the petitioner was influenced by the identities of the lawyers involved.

9. That the petitioner was influenced by the identities of the litigants involved.

10. That the petitioner was influenced by improper, ex parte approaches.

11. That the petitioner was impatient and discourteous to litigants, witnesses and jurors.

12. That the petitioner was impatient and discourteous to lawyers.

13. That the petitioner was deficient in judicial temperament and demeanor.

17. That the petitioner was inattentive to arguments and testimony.

18. That the petitioner was deficient in management and control of the trial.

20. That the petitioner's written opinions lacked quality and were not clear.

21. That the petitioner's comments from the bench and written opinions were grossly critical of litigants, judges or lawyers.

D. The Amended Petition Alleges That the Bar Failed to Use Statistical Tools Available to It to Produce a Valid Evaluation, as It Had Promised.

Having assumed the duty to deliver a valid evaluation, and having selected the survey method to do so, the Bar failed to use any of the statistical tools available to it to produce what it promised.

Almost fifteen years ago the Supreme Court of the United States recognized the value of statistics in Casteneda v. Partida, 430 U.S. 482 (1976). Partida showed that Mexican Americans constituted 79.1 per cent of the population from which jurors were drawn. But their inclusion on jury panels ranged from 39 per cent to 45.5 per cent over a ten year period. Noting statistical disparities, the Supreme Court found Partida was denied equal protection of the laws.

Since the time of Casteneda the science of statistics and the use of the survey as a research tool has increased dramatically. The polling business recognizes statistical criteria which will produce a result which is recognized as valid. Without the satisfaction of these standards the result is not considered to be valid. On such statistical knowledge and criteria political analysts plan election campaigns; the news media uses the information to project quite accurately the outcome of elections, with few surprises; and major corporations make marketing decisions involving millions of dollars on the basis of consumer research surveys. When responsible polling organizations publish the results of a poll, they even publish the margin of error, which is generally about five percent. That same statistical knowledge and method was known to the Bar, and if the bar used it, it could have produced a valid survey.

Validity is an issue to be tested in every legitimate poll. The Bar assumed the duty to deliver valid information. It had within its means the capacity to produce it. It chose the form of a survey to conduct the evaluation, but it used no statistical tool to test the validity of the survey. Indeed, Bar admits in discovery which it did grant, which admissions are alleged in the Amended Petition, that it made no attempt to evaluate the results obtained from its survey.

The Bar admitted that "No individuals specializing in statistics, or opinion polls as a field of study, were consulted." It admitted that it did not establish a mean for the returned evaluations, nor a standard of deviation to test the results. Rather, it conducted the survey with reckless disregard of the truth or falsity of the result obtained.

The Bar promised the public that to assure validity only lawyers with recent personal experience with the judge could respond. The Bar had records readily available to it to limit issuance the the evaluation form to only those lawyers, but the Bar mailed its survey to all its active members. The Bar included all survey returns in the published results without regard to the truth or validity of the results obtained.

The survey results suggest that several returns rated the petitioner at the bottom of the scale in every one of the twenty-one characteristics. That is statistically impossible, and had the bar used the tools available to it to test the results as it promised it would have excluded those returns from the results. The Bar included them. The petitioner has not been permitted to discover the actual returns.

E. The Amended Petition Alleges the Bar Published Defamatory Statements About the Petitioner

Prosser on Torts at page 739, defines defamatory statements as which tend to "diminish the esteem, respect, good will or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against" the plaintiff.

50 AmJur 2d at 520 defines defamatory language:

> Language is defamatory if it tends to expose another to hatred, shame, obloquy, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or

to induce an evil opinion of one in the minds of right-thinking persons and to deprive him of their confidence and friendly intercourse in society.

In addition to the general definition of defamation, above, in Nebraska words imputing a want of integrity or misfeasance or malfeasance to anyone holding an office of confidence or trust, whether an office of profit or not, are libelous per se. Shummway v. Warrick, 108 Neb. 652 (1922). See also Estelle v. Daily News Publ. Co., 99 Neb. 397, 156 NW 645 (1916), overruled in part, Hall v. Rice, 117 Neb. 813 (1928).

F. The Amended Petition Alleges That the Defamatory Statements Were Made With Actual Malice

1. The published Bar survey, when read with its prior promise to

> deliver valid information, reasonably implies an assertion of objective fact and the assertions were made with knowledge of their falsity or with reckless disregard for their truth.

New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686, 95 ALR2d 1412 (1964) held:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" that is with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U.S. at 279.

The same rule was applied to public figures in Curtis Publishing Co. v. Butts, 388 U.S. 130, 18 L.Ed.2d 1094, 87 S.Ct. 1975 (1967).

Prior to the publication of its purported judicial evaluation the Bar asserted it would produce a valid evaluation providing solid information to the voter. After litigation the Bar changed its position and claimed that its survey was only a collection of lawyers opinions and therefore not defamatory.

Ignoring the Bar's prior claim of validity, and looking only to its later claim that the evaluation was mere opinion, the argument is dismissed by Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990). That case looks beyond whether a statements purports to be an opinion or fact.

Milkovich concludes:

> Thus, where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth.

The evaluation results must be read with the prior claim that they were valid and provided solid information to the voter. Moreover the resulting statements were capable of being proved true or false. The judicial performance of a judge is one of the most documented of any profession. Recordings are made of all judicial proceedings in the County Courts of Nebraska. The State Court Administrator's Office keeps records of aging analysis of cases which objectively shows docket control, and promptness in rendering opinions. The local courts have records from which one can objectively determine the judge's promptness in rendering opinions, the quality of the opinions, and docket control.

Courtesy and judicial temperament are not entirely subjective matters. Rather, local records, including tape recordings of each of the proceedings, are maintained and available to prove or disprove statements of the Bar survey concerning those areas of the plaintiff's judicial performance.

The matter of improper influence can also be objectively determined. Appellate courts determine such matters on a regular basis, on the basis of objective fact. Knowledge of the law can be objectively determined. In the first instance, no one would rationally argue that law school grades lack an objective basis. The

Petitioner graduated from law school with distinction, he chaired new judge orientation, and presented seminars to judges on several areas of the law. Finally, if the petitioner had made comments from the bench and in written opinions which were grossly critical of litigants, judges or lawyers, there would be records to prove or disprove the assertion.

2. The public expects a public poll to be scientifically conducted and objective

The public is accustomed to reading in the newspapers, or hearing on television or radio, the results of various polls and surveys. They hear or read the margin of error that is established by statistical means for the poll. A reasonable person believes that a public survey is scientifically conducted, and it is factual within the stated degree of certainty.

3. The Bar assumed the duty to produce a valid evalution, and it had the ability to do so.

The Nebraska Supreme Court held that the analysis of Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), cert. denied 471 U.S. 1127, 105 S. Ct. 2662, 86 L. Ed. 2d 278 (1985) applied. The Court noted that Ollman held that four factors should be used to assess whether a statement is viewed as fact: specificity of the statement, its verifiability, the literary context, and the broader setting in which the statement appears. However, the Court never applied these factors to the Bar's representation that its evaluation was valid, solid information, factual and objective. Without applying these factors, the Court merely held:

> It may be that Wheeler was in reality a good judge; but if so, he was nonetheless perceived by those who rated him to be otherwise. The raters had a right to their subjective views, and the bar association had the right to publish those collective impressions.

If Wheeler were in reality a good judge but the bar said that its valid evaluation showed he was not, the evaluative conclusion is contrary to the facts, and the evaluation cannot serve the public interest. Moreover, to justify the conclusion as a mere opinion dismisses outright the Bar's claim that it was not mere opinion, but valid information.

The Nebraska Supreme Court dismissed the promise of a valid evaluation and solid information as hyperbolic. Webster's

Ninth New Collegiate Dictionary defines "hyperbole" as "extravagant exageration <'mile high ice cream cones' is an example of __>." Hyperbole is not just an exaggeration, but an extravagant exaggeration. That is the reason that Aisenson v. American Broadcasting Co., 220 Cal. App. 3d 146, 269 Cal. Rptr. 379 (1990), upon which the Nebraska Supreme Court heavily relies holds that a permitted hyperbole is determined by the standard of a reasonable person: it is so extravagant an exaggeration that no reasonable person would believe the claim and would understand the claim to be mere hype.

A promise to to produce what is in fact producible cannot, by definition, be hyperbole. Rather, it is an assumption of duty. To rule that the duty assumed is hypebolic, a permitted exaggeration is to hold that the Bar had the right to deceive the public for the Bar's own political purposes. That is inconsistent with the Bar's duty of public service.

4. The Amended Petition Alleges that the Bar willingly permitted its evaluation method to be abused in a concerted effort of lawyers to defame the petitioner.

The Nebraska Supreme Court speaks of the First Amendment's protection of opinions. Legitimate opinions based upon recent first hand experience is one thing, but vindictive and false representations are quite another. The latter is distinguishable from true opinions. A lawyer can claim in a vindictive evaluation a low opinion of a judges' performance which that lawyer does not in fact hold. Such a use of the evaluation process is abusive. That subject of abuse is not addressed by the Court.

In his first opinion Judge Murphy addressed the fact that the Bar's method of evaluation was subject to abuse (Appendix C):

> Responses may be made by individuals residing outside the judicial district in which the judge resides thereby lessening its value as a tool for the public to use in voting on retention. It does not appear to apply statistical analysis to correctly quantify the results. Under the poll as conducted, greater weight is given the opinion of someone who gives a judge all "ones", the worst rating, than an individual rating a judge "three" or "four" in a particular characteristic, thus rewarding a potentially vindictive voter. (For example, if there were four

> voters and three give a judge a "three" and one voter gives a judge a "one", the average is 2.5 or "deficient" even though three out of four thought the judge satisfactory.) The potential, at least, for misusing the poll may arise in a situation where a judge is forced to take a position unpopular with attorneys. In addition, the results of the poll may weigh more heavily on judges in the less populated rural areas of the state because of the lack of diversity in the media reporting the results and the lack of other news to, in effect, drown out the results of the poll.

Elsewhere, Judge Murphy observed in the same Order:

> The Court recognizes that a harsh result may flow from its ruling in this matter. The Court has no objective way

of knowing the motivations of the lawyers responding in this poll. Certainly, this Court has no way of knowing whether the rating of the Plaintiff was correct or incorrect or was the result of his merely performing the duties required by law and, thereby, alienating the lawyers who were to vote in the poll. The Court does recognize that the judicial evaluation poll as used presently has the potential for being misused as the Plaintiff claims that it was in this case and, if the poll was misused, then the Plaintiff may have, in fact, been treated unfairly. If that is the case, then the Plaintiff is correct in his assertion that no forum is available to him to resolve that unfairness.

Neither the trial court, however, nor the Nebraska Supreme Court addresses the knowing abuse of the method giving rise to defamation, which the Amended Petition alleges.

Judge Murphy noted in his first Order (Appendix C) the example of Colorado, which appears legitimately to be a valid evaluation, and protects the judges from anonymously vindictive attack:

> To avoid such difficulties, Colorado has developed a system of evaluation based on citizen committees conducting interviews, observing the judge in question, and reviewing survey results from attorneys and litigants in order to advise the judge of that jude's strengths or weaknesses. This approach accomplishes both purposes sought to be accomplished by the bar poll - giving some information to the public so that they may make an informed choice in retention and giving the judges

> feedback. See, Anne Rankin Mahoney, Citizen Evaluation of Judicial Performance: The Colorado Experience, 72 Judicature 210 (1989).

The Colorado Experience demonstrates that the claims were achievable, not hyperbolic. And it also demonstrates that the Bar could have protected its method from abuse.

The Amended Petition alleges the very abuse which Judge Murphy noted. The petitioner should have been permitted to discover and produce the evidence which is suggested by the facts that are known: that seven lawyers rated the Petitioner at the bottom in every one of the twenty-one categories. Several of the categories evaluated were as basic as getting to court on time, efficiency in docket management, and promptness in making rulings can objectively determined by records maintained by the judiciary, locally and at the state level. That such results are valid is statistically impossible. Not even Sadam Hussein or Adolph Hitler would have been found deficient in each of these categories if these were applied to their official performances. They were at least efficient in "docket control," whatever we might say about their demeanor or respect for those with whom they dealt. Inclusion of such returns in the Bar's published results is statistical proof of actual malice under New York Times, supra, and Milkovich, supra.

5. Further, the Bar has an ethical obligation to speak the truth concerning judicial performance if

it chooses to undertake an evaluation.

The bar and its individual members have an ethical obligation to produce only factually valid evaluations if it produces anything at all, and to exclude obviously false and invalid evaluations. The Code of Professional Conduct, DR 8-101 provides:

> (A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.
>
> (B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

The bar had obvious information that the survey was being abused and that those returns were in fact unethically made. Granting lawyers confidentiality in their returns is an invitation to such unethical conduct. Under the Bar's guarantee of anonymity (for which there is no statutory basis) there can be no consequence for a vindictive return. Where there is no accountability in the process, the Bar has invited irresponsibility and abuse.

On the one hand, the Bar by its code of ethics prohibits individual returns which make false representations of fact or false representations of the qualifications of a judge, but with the other hand the Bar grants lawyers license to do as a group what its individual members cannot. The Nebraska Supreme Court has in effect granted the Bar absolute immunity. If the American Medical Association had destroyed the career of one of its doctors with a similar "evaluation" of that doctor's medical practice performance, there would be no question as to that Association's liability. That same law should apply to lawyers. The medical profession has lawyers to enforce the law and the standards of performance it protects. Unfortunately there is no profession outside of lawyers to hold the lawyers to the same standards of performance.

6. Had the Bar chosen to merely collect the opinions of lawyers, it perhaps could have done so without liability; but the bar did not choose to give mere opinion, but rather solid information.

The petitioner admits that the Bar could have published a mere collection of lawyers opinions, or asserted opinions, without liability. But the Bar represented that its evaluation would be a valid evaluation presenting solid information to inform the voter and a report card to the judge of his or her strengths and weaknesses. That representation, _and the possibility of providing it_, as the Colorado Experience demonstrates, takes the Bar's publication out of the realm of mere opinion unfounded in fact, out of mere puffing, hyperbole or exaggeration, and out of the protection of the First Amendment. Moreover whereas mere opinion is protected by the First Amendment, vindictive and intentional false statements are not, particularly not when made by officers of the judicial system.

7. _Aisenson, Upon Which the Nebraska Supreme Court Relies, is Distinguishable and Is In Fact_

Supportive of Petitioner's Position.

The Nebraska Supreme Court relies heavily upon Aisenson, infra, but the facts of that case are distinguishable.

The stated purposes of the ABC survey is distinguishable

In Aisenson v. American Broadcasting Co., 220 Cal. App. 3d 146, 269 Cal. Rptr. 379 (1990) ABC made no representations concerning its survey except to call it a survey of lawyers opinions about the performance of the judges who were surveyed. In the present case the Bar claimed that its evaluation would be valid, solid information, and factual.

ABC's offer to Aisenson of an opportunity to effectively defend himself is distinguishable

ABC made repeated calls to Judge Aisenson and requested an interview, and even offered to put a camera in his courtroom so that the public could see what really happened there. The Bar, granted no opportunity for the petitioner to defend himself.

The professional conduct of the ABC poll is distinguishable

ABC employed a professional company that performed public opinion research analysis for use by the broadcast media; it even applied statistical tests in compiling the results and in deciding what should be included in the survey. The Bar consulted no expert, and it applied no statistical analysis but included all returns without regard to the statistical validity of the returns. Judge Murphy Order, Appendix

C, said of the Bar's evaluation, "It does not appear to apply statistical analysis to correctly quantify the results."

The timing of ABC's claim for its poll is distinguishable

Aisenson claimed that ABC's statement that its poll was intended to assist the public in the November 1983 election was important. That court held that the statement was made in litigation and it was not considered in the analysis of whether the published statement was defamatory. The Bar made its claim before it published its evaluation; its prior claim is central to the issue of defamation.

ABC's characterization of Aisenson is distinguishable

The only characterization which ABC made of Aisenson was that he was the lowest scoring judge in the poll. The Bar publically evaluated twenty-one performance categories.

ABC's business as a news organization is distinguishable

ABC is a news organization, in the business of selling its news and features. Salesmanship permits hyperbole where the public has come to expect it. Nor did ABC have an ethical obligation to the judiciary or the judge polled. The Bar, on the other hand, is not in the business of selling stories. The lawyer is an officer of the court, and the Bar inherits that duty of fidelity and service, not salesmanship in self-interest.

Indeed Labelle v. Hennepin County Bar Ass'n, 288 N.W. 788 (Minn. 1939) addresses the high principles of public duty and service to which a lawyer is called.

> . . . [I]t is a lawyer's duty to diffuse sound principles among the people that they may intelligently exercise their controlling power in the selection both of judges and legislators.

Id. at 792. That case continues and quotes Elihu Root in his treatise "Some Duties of American Lawyers to the American Law:"

> He is a poor-spirited fellow who conceives that he has no duty but to his clients and sets before himself no object but personal success. To be a lawyer working for fees is not to be any the less a citizen whose unbought service is due to his community and his country with this best and constant effort. And the lawyer's profession demands of him something more than the ordinary public service of citizenship. He has the duty to the law. In the

> cause of peace and order and human rights against all injustice and wrong, he is the advocate of all men, present and to come. If he fail in loyalty to this cause; if he have not the earnestness and sincerity which come from a strong desire to maintain the reign of law; his voice will ring false in the courts and will fail to carry conviction to judicial minds.

Id. at 792, 793.

Aisenson's comment on subjectivity in evaluation is distinguishable

The opinion in Aisenson does contain language,

> Virtually every assessment of judicial performance short of a purely numerical comparison of verdicts or sentences or of affirmance and reversal rates - must rely on the subjective opinions of

observers. (emphasis supplied)

Id. at 159. But that does not deny that there is a method of objective assessment. Secondly, the mere presence of subjectivity does not deprive a statement of its predominately objective base. Einstein demonstrated that is true even in science. Measurement by the most objective of observers with the most precise of instruments is still relative to the circumstances and position of the observer: subjectivity cannot be eliminated from human measurement. Nonetheless, science continues to be viewed as reliable and objectively based. It is no different with any evaluation. We may never entirely irradicate the subjective, but that does not in turn negate the objective.

Moreover, the ABC poll did not promise solid information to inform the voter, as did the Bar. It announced to the public that it was a poll of lawyers concerning the judges, and nothing more. The Bar, however, promised solid information, objective information. The Bar could have done the very thing that Aisenson acknowledges could have constituted an objective assessment: look at the records and compare the numbers.

The Nebraska Supreme Court has converted the Bar's evaluation from its claim of validity to pure subjectivity. Mere subjectivity unfounded in fact cannot aid the administration of justice. Ky Registry of Election v. Louisville Bar Ass'n, 579 S.W.2d 622 (Ky.App. 1979), acknowledged the factual base of such evaluations when it accepted the finding of the Kentucky Registry concerning the Louisville Bar Association that the

> intent, and primary and principal effect of the . . . publication of the results of its judicial poll is to inform the electorate of the qualifications of judicial candidates, in an objective manner without preferential declaration or endorsement of any such candidate.

The Colorado Experience demonstrates the practicability of the Bar's promise of solid, objective information on judicial performance. Only a valid evaluation founded in fact, as the Bar promised, can fulfill the purposes of objective public service which justified such endeavors.

Moreover, the lawyer has an ethical obligation to speak the truth about the judicial system. There is no room for hyperbole in such matters. Indeed hyperbole and public service are a contradiction in terms.

The Aisenson decision upon the evidence is distinguishable

Aisenson was decided upon a motion for summary judgment and the evidence, presumably gathered through discovery, which was offered at that hearing. This case was decided on a demurrer. Despite factual claims of the petitioner, the petitioner was not permitted discovery, nor was he permitted to produce any evidence in support of his Amended Petition.

II. THE PETITION STATES A CAUSE OF ACTION FOR DEPRIVATION OF PLAINTIFF'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

A cause of action is judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that duty. Millman v. County of Butler, 235 Neb. 915 (1990) at 926.

The Amended Petition alleges that the Bar deprived the plaintiff of his property right to his good reputation, without due process of law guaranteed to the plaintiff under the Fifth Amendment to the federal constitution. This allegation is stated within the context of all the preceding allegations, including that the Bar is a creation of state judicial action and administered by the Nebraska Supreme Court, and that it deprived him of his career. The Bar, as a creation of the judicial branch of state government, owes to the plaintiff a duty to act within the constitutional constraints applicable to governmental action. The Bar has deprived the plaintiff of his federal constitutional rights to the plaintiff's damage.

Judge Murphy noted the fact that the Bar evaluation, as conducted was subject to abuse, and that the petitioner may in fact have been treated unfairly. He writes that if petitioner has been treated unfairly, it is correct that plaintiff has no forum available to him to resolve that unfairness.

Fairness, while a general term and not legally artful, is nonetheless at the core of the concept of Fifth and Fourteenth Amendment due process. Judge Murphy's statement implies that petitioner may have been deprived of due process, but petitioner has no remedy. That is not the law. Millman, supra, holds to the contrary. The Civil Rights Act was passed to assure a remedy to people in the petitioner's position.

The Bar passed judgment on the petitioner's character and judicial performance without due process of law. The Bar in fact engaged in intentional character assassination and under the rulings of the trial court and the Nebraska Supreme Court, there is absolutely nothing that this petitioner, or any judge in the future, may do to defend himself or herself against it. That is a violation of the petitioner's, and all judges', right to due process.

The Bar is liable for that damage in a suit at law, and it is further subject to equity jurisdiction of the courts for continuing violations of the plaintiff's rights.

III. THE PETITION STATES A CAUSE OF ACTION FOR DEPRIVATION OF PLAINTIFF'S FEDERAL CONSTITUTIONAL RIGHT TO A FAIR

TRIAL BEFORE A FAIR AND IMPARTIAL TRIBUNAL GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS.

The Amended Petition alleges the plaintiff's right to a fair trial, which is, at a minimum, chilled presently, by the threat of future bar surveys like the one subject of this suit. Whether in this case, or in any other which the plaintiff might bring in the future in which the bar may have a contrary interest, the plaintiff's rights to a fair and impartial tribunal, are now and in the future, immanently threatened. That is especially true under the Nebraska Supreme Court's holding which essentially grants the Bar absolute immunity from suit, even from its intentional character assassination of a judge. No judge who puts career security above service under the law would take the risk of ruling against the Bar, or even members of the Bar, under such circumstances. Job security is a desire of all human beings, including judges.

IV. THE PETITION STATES A CAUSE OF ACTION FOR INJUNCTION AGAINST THE BAR ASSOCIATION'S FUTURE USE OF THE JUDICIAL PERFORMANCE EVALUATION.

The plaintiff seeks temporary and permanent injunction against future bar surveys to protect these rights.

The survey as it is conducted violates judges' constitutional rights and threatens impermissibly the independence of the judiciary.

CONCLUSION

The plaintiff respectfully submits that the Nebraska Supreme Court has set a standard for First Amendment Speech which is contrary that set by this Court. The Nebraska Supreme Court sets a standard for

Bar Associations around the country which permits the associations to make every claim of legitimacy and objectivity, do nothing to accomplish that goal, in fact, intentionally print defamatory and vindictive statements without liability. That holding essentially grants absolute immunity to all bar associations, no matter how deliberately false the statement. Responsible government demands accountability, and such a holding cannot stand. The Petitioner therefore requests that the Court grant certiorari.

Dated this 14th day of March, 1994.

ROBERT E. WHEELER, Plaintiff

Robert E. Wheeler

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APPENDIX A

OPINION OF THE SUPREME COURT
OF NEBRASKA

WHEELER v. NEBRASKA STATE BAR ASSOCIATION

Filed December 23, 1993 No. S-92-268

Appeal from the District Court for Custer County: John P. Murphy, Judge. Affirmed.

Hastings, C.J., Boslaugh, Caporale, Fahrnbruch, and Lanphier, JJ, and Grant, J., Retired.

CAPORALE, J.

I. STATEMENT OF CASE

After the district court sustained the defendant-appellee Nebraska State Bar Association's demurrer to the plaintiff-appellant Robert E. Wheeler's amended petition, Wheeler elected to stand on that pleading. The district court thereafter dismissed the suit. Although Wheeler assigns additional errors, they are subsumed in his claim that the district court erroneously determined that the amended petition failed to state a cause of action. The record failing to sustain that claim, we affirm the judgment of the district court without reaching the other assignments of error.

II. FACTS

Wheeler, a former county court judge, alleges in his amended petition that the bar association, in releasing its "NSBA Judicial Performance Evaluation - 1990" of judges to the media, caused him to lose the 1990 election for retention in his judicial office and, in addition has caused him to suffer general damage to his reputation which prevents him from gaining further employment. Wheeler further pleads that the bar association had reason to know that many of the lawyer survey responses were invalid, but nonetheless published the allegedly defamatory survey without investigating the truth or validity of the individual responses.

Averring that the bar association published the defamatory survey without regard to the truth or validity of the individual lawyer statements, Wheeler maintains that, in concert with its members, the bar association acted to defame him by including obviously invalid and vindictive responses in its survey.

More specifically, Wheeler asserts that prior to the release of the survey, the bar association published a news release in which, under the heading "Lawyers to rate judges' performance," the bar association stated its intention to publish an evaluation to give "'"voters solid information about the judiciary to help them make informed decisions on judges standing for retention this November"′" and to give "′"each judge a report card of his or her strengths and weaknesses."′" The release went on to claim that "′[t]o assure valid results, lawyers must base their evaluations on recent, first-hand experience with the judge . . . .′" Wheeler professes that in making those statements, the bar association told the public that the survey′s results were "fair, valid, and solidly based upon the facts of the judge′s judicial performance."

The amended petition continues by reciting that on that same day, the bar association issued to its nonjudicial members a form on which they were to evaluate state and federal judges in 21 performance characteristics from a 1, very poor performance, to a 5, excellent performance.

The results, Wheeler asserts, were then received by the bar association and tabulated for distribution to the public without any statistical analysis to test the validity of the results obtained; nor did the bar association interpret the data collected or establish a mean or standard of deviation, despite the existence of a recognized science for evaluating the responses and drawing conclusions from the results. Wheeler also states that the bar association mailed the survey to all of its active members in disregard for the truth and validity of its results despite ethical restrains of the bar association that prohibit members from answering the survey if the member has not had sufficient experience with the judge's performance. Further, he alleges that more lawyers responded to his evaluation than there were lawyers with sufficient information to answer the survey and that, in fact, the number of lawyers who responded to his evaluation were more than the number who answered the survey of other judges with comparable judicial workloads and exposure.

Wheeler declares that the bar association made no investigation of the validity of the individual responses, nor did it establish any standards to assure the fairness and validity in its survey form and method. He concludes that the bar association released and published the judicial evaluation with actual malice and avers that the survey was used as the basis of further libel and defamation in a campaign against his retention, which use and abuse the bar association could reasonably have foreseen. Such actions, according to Wheeler, constitute libel per se.

Reciting that after the survey was published, he lost the retention election by a margin of 173 votes out of a total of 8,861 votes cast, he seeks, among other things, money damages for the loss of his position as a judge and for the loss of his reputation. In addition to claiming that he was defamed, he asserts he was deprived of his federal and state rights to procedural and substantive due process and trial by jury and that the denial of these rights may entitle him to relief under 42 U.S.C. Section 1983 (1988).

III. ANALYSIS

1. Scope of Review

Before proceeding further, we once again recall that in considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, making factual findings to aid the pleading, or consider evidence which might be adduced at trial. St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co., ante p. 408, ____ N.W.2d ____ (1993); Gallion v. Woytassek, ante p. 15, 504 N.W.2d 76 (1993); Hamilton v. City of Omaha, 243 Neb. 253, 498 N.W.2d 555 (1993); LaPan v. Myers, 241 Neb. 790, 491 N.W.2d 46 (1992).

A statement of facts sufficient to constitute a cause of action means a narrative of the events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff. St. Paul Fire & Marine Ins. Co., supra; Gallion, supra; Hamilton, supra; Gerken v. Hawkins Constr. Co., 243

Neb. 157, 498 N.W.2d 97 (1993).

In ruling on a demurrer, the petition is to be construed liberally; if as so construed the petition states a cause of action, the demurrer is to be overruled. St. Paul Fire & Marine Ins. Co., supra; Matheson v. Stork, 239 Neb. 547, 477 N.W.2d 156 (1991); Widga v. Sandell, 236 Neb. 798, 464 N.W.2d 155 (1991).

If from the facts stated in the petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie. St. Paul Fire & Marine Ins. Co., supra; Central Nebraska Public Power and Irrigation District v. Walston, 140 Neb. 190, 299 N.W. 609 (1941).

2. Nature of Defamation

The question of whether a particular publication is defamatory is, in the first instance, a question of law for the court. Silence v. Journal Star Printing Co., 201

Neb. 159, 266 N.W.2d 533 (1978). Obviously, the nature of the allegedly defamatory statement is critical; beginning with dictum in Gertz v. Robert Welch, Inc., 418 U.W. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), appeal after remand 680 F.2d 527 (7th Cir. 1982), cert. denied 459 U.S. 1226, 103 S. Ct. 1233, 75 L. Ed. 2d 467 (1983), courts began to distinguish between statements of fact and opinion, holding that statements of opinion were protect by the First Amendment and thus not actionable. See Moyer v. Amador Val. Jnt. Union Sc. Dist., 225 Cal. App. 3d 720, 275 Cal. Rptr. 494 (1990).

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on

> the competition of other ideas. But there is no constitutional value in false statements of fact.

Gertz, 418 U.S. at 339-40.

Sixteen years later, the U.S. Supreme Court rejected what it called "the creation of an artificial dichotomy between 'opinion' and 'fact.'" *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990), *on remand sub. nom Milkovich v. News-Herald*, 70 Ohio App. 3d 480, 591 N.E.2d 394, *cause dismissed* 59 Ohio St. 3d 702, 571 N.E.2d 137 (1991). The high court explained that the language in *Gertz* had been interpreted too broadly and was not intended to create a wholesale defamation exemption for anything that might be labeled opinion. Instead, the *Milkovich* Court made clear that a false assertion of fact could be libelous even though couched in terms of opinion, while still recognizing that statements that cannot be interpreted as stating facts are entitled to protection. Thus, the threshold question in defamation suits is whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion.

The Milkovich Court determined that the statement before it--that a high school wrestling coach lied at a judicial hearing--implied an assertion of fact. In reversing the dismissal of Milkovich, the Court cited three reasons a jury could conclude that the statement accused Milkovich of perjury: first, the statement was not loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining Milkovich committed the crime of perjury; second, the general tenor of the article did not negate the impression created by the defamatory language; and third, the connotation that milkovich committed perjury is sufficiently factual to be susceptible of being proved true or false.

Although Milkovich rested in part on the previous holding in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986), appeal dismissed, cert. denied 475 U.S. 1134, 106 S. Ct. 1784, 90 L. Ed. 2d 330, which was explicitly limited to the cases involving media defendants, courts have extended Hepps and Milkovich to nonmedia defendants. Don King Productions, Inc. v. Douglas, 742 F. Supp. 778 (S.D.N.Y. 1990); Dodson v. Dicker, 306 Ark. 108, 812 S.W.2d 97 (1991); Kahn v. Bower, 232 Cal. App. 3d 1599, 284 Cal. Rptr. 244 (1991).

The Milkovich test places emphasis on the objectivity and verifiability of a statement. In so doing, the approach is similar to pre-Milkovich cases using the fact-opinion analysis.

California courts use a "'totality of the circumstances'" test to establish the objectivity and verifiability of a statement examining first the language of the statement and then the context in which the statement was made. Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254, 260, 721 P.2d 87, 90, 228 Cal. Rptr. 206, 209 (1986), cert. denied 479 U.S. 1032, 107 S. Ct. 880, 93 L. Ed. 2d 834 (1987), reh'g denied 480 U.S. 912, 107 S. Ct. 1360, 94 L. Ed. 2d 531. See, also, Milkovich, supra (Brennan, J., dissenting).

In such an analysis, a court looks at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed. Baker, supra. A multifactor test assessing the allegedly defamatory statement in the totality of the circumstances in which it appears has been adopted in other states as well. Information Control v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980); Burns v. McGraw-Hill Broadcasting Co., Inc., 659 P.2d 1351 (Colo. 1983); Cole v. Westinghouse Broadcasting Co., Inc., 386 Mass. 303, 435 N.E.2d 1021 (1982), cert. denied 459 U.S. 1037, 103 S. Ct. 449, 74 L. Ed. 2d 603. See, also, Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), cert. denied 471 U.S. 1127, 105 S. Ct. 2662, 86 L. Ed. 2d 278 (1985) (four factors used to assess whether statement viewed as fact: specificity of the statement, its verifiability, the literary context, and the broader setting in which the statement appears, e.g., part of a public debate); *Lester v. Powers*, 596 A.2d 65 (Me. 1991).

Indeed, *Letter Carriers v. Austin*, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974), and *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970), appear to have applied the analysis later delineated in *Milkovich*. In *Letter Carriers*, three nonunion employees of the postal service were included on a list of names titled "List of Scabs" circulated by the Letter Carriers Union. A piece of trade union literature defining a "scab" as a "'traitor to his God, his county, his family and his class'" was attached to the list. (Emphasis omitted.) 418 U.S. at 268. In determining that the description of "scab" was opinion, the *Letter Carriers* Court considered both its specific linguistic context and its broader social setting. The Court found that 'traitor," in the context of the union literature, was used in a loose, figurative sense and could not be taken for an assertion that the employees had committed the criminal offense of treason. The Court further noted that because the statements appeared in union literature, readers would be alerted by virtue of the broad context in which the statement was made that the statement was opinion.

Letter Carriers relied upon Greenbelt Pub. Assn. for the proposition that the allegedly libelous language must be evaluated in its broader context to assess whether a reader would have understood the allegation to be a statement of fact. In Greenbelt Publ. Assn., a developer was attempting to secure a zoning variance to construct high-density housing. The developer's negotiating tactics were characterized as "blackmail" in the local papers, and he sued, alleging that the articles imputed a crime to him. The Greenbelt Publ. Assn. Court reversed the developer's judgment against the newspaper which had printed this statement, concluding that as a matter of constitutional law, the word "blackmail" in these circumstances was not libel when reported. The Greenbelt Pub. Assn. Court then held that in light of the full context of the articles, a reader would have understood the blackmail statement as a criticism of the developer's negotiating tactics rather than as an actual criminal charge.

We hereby adopt the use of the totality of the circumstances analysis in determining whether a statement implies a provably false factual assertion. In applying that analysis to the case at hand, we must determine whether the allegedly defamatory statements of the bar survey had a precise meaning, likely to give rise to factual implications capable of proof or disproof. The complexity inherent in determining whether a statement is verifiable can be seen in the case of Ollman, supra. Therein, a professor stated that Ollman had no status within the political science profession. The Ollman court ruled that the quotation of the professor was protected as opinion and held that the no status charge would plainly appear to the average reader to be rhetorical hyperbole in the light of Ollman's position as a professor at one university and his nomination as chairman of an academic department at another. One dissenter, however, reasoned that the statement was verifiable, such as by conducting a poll of American Political

Science Association members as to their opinion, on a scale of 1 to 10, of the scholarly value of Ollman's work (Wald, J., dissenting in part). Contra, Cepeda of Cowles Magazines and Broadcasting, Inc., 328 F. 2d 869, 870 (9th Cir. 1964), cert. denied 379 U.S. 844, 85 S. Ct. 51, 13 L. Ed. 2d 50 (remarks that a baseball player had "'doghouse status'" not protected).

In the instant case, lawyers were asked to rate a judge with respect to knowledge and application of substantive law and rules of evidence and procedure; ability to perceive factual and legal issues; awareness of recent legal developments; an absence of bias or prejudice in civil and criminal cases; whether the judge was influenced by the nature of the case, identities of lawyers or litigants involved, or improper ex parte approaches;

patience and courtesy to lawyers, litigants, witnesses, and jurors; overall judicial temperament and demeanor; efficiency in docket management; punctuality in attending court proceedings and promptness in making rulings and giving decisions; attentiveness to arguments and testimony; management and control of trial; efficiency and conscientiousness as a worker; quality and clarity of written opinions; and an absence of undue personal observations or criticisms of litigants, judges, and lawyers from the bench or in written opinions. In addition, lawyers were asked to indicate whether the judge's health was such that the judge could effectively discharge the duties of the judicial office and whether the judge should be retained in office.

In a case very similar to the one at hand, Aisenson v. American Broadcasting Co., 220 Cal. App. 3d 146, 269 Cal. Rptr. 379 (1990), a superior court judge brought a defamation suit against a television station as a result of the station's reporting that the judge had received the lowest score of all local superior court judges in an opinion poll of attorneys conducted by the station. The poll posed six questions similar to those in the poll now before us: Did the judge have the appropriate demeanor, temperament, courtesy? Was the judge usually decisive? Did the judge tend to impose appropriate sentences? Did the judge know the law? How did the judge rate overall? The attorneys ranked the judges on a 1-to-10 scale, with 10 as excellent, and, as in this case, were instructed to evaluate only those judges with whom they had enough experience to form a fair evaluation. The Aisenson court found that the poll reflected the opinions of the attorneys who participated in it, and those opinions are protected regardless of whether they are well founded or utterly wrong. However, the court reasoned that when the station broadcast the opinions of the attorneys, the opinions became facts and not editorial comment or criticism. Hence, the station would be liable only if it aired false statements of fact by not reporting the results of the poll truthfully and accurately. Finding that there was no evidence that the completed ballots had been tampered with, that the computer printout did not reflect the opinions expressed by the attorneys being polled, or that the data processing cards inaccurately encoded the information contained in the ballots, the court ruled that the responses were not defamatory, noting that virtually every assessment of judicial performance short of a purely numerical comparison of verdicts or sentences must rely on the subjective opinions of observers. Therefore, to form the basis for a cause of action for defamation, the survey results must be verifiable.

Wheeler argues that some the of characteristics on which he was rated are subject to verification. He points out that the matter of docket control, punctuality, promptness in rendering opinions, and the quality of his opinions can be verified through local court records. In much the same manner, he asserts that his knowledge of the law can be discerned form his law school transcripts and his teaching abilities in new-judge orientations and seminars.

Further, he argues that courtesy and judicial temperament are "not entirely subjective" and are determinable from tape recordings of each of the proceedings. Wheeler further urges that the matter of improper influences is verifiable, based on the number of appeals filed from his decisions.

Thus, contrary to the position taken by the Aisenson plaintiff, Wheeler complains that the bar association "'did not interpret the date collected nor was it modified or altered in any manner,'" that "'[i]t was reported as receive,'" and that "all survey returns [were included] in the published results." Assuming without deciding, that the sources Wheeler points to could have some relevance in determining the characteristics on which he was judged, it is still clear that the survey was a compilation of attorneys' subjective ratings on each characteristic. As such, the ratings given him represented a collective subjective evaluation, which by its very nature ranged from well founded to utterly wrong. See Botos v. Los Angeles County Bar Ass'n, 151 Cal. App. 3d 1083, 199 Cal. Rptr. 236 (1984). Whether Wheeler receives a 1, 2, 3, 4, or 5 on a particular characteristic comes down to a subjective interpretation by an individual attorney. A representation that a candidate is able and has proper character and temperament is simply a subjective expression of opinion. Association of Bar of City of New York v. C.I.R., 858 F.2d 876 (2d Cir. 1988), cert. denied 490 U.S. 1030, 109 S. Ct. 1768, 104 L. Ed. 2d 204 (1989). Ratings by their very nature will reflect the philosophy of those doing the rating and are nothing more than expressions of subjective evaluations concerning a judicial candidate's qualification. There is simply no objective method to determine the rating an individual judge should receive in any given performance category; therefore, by their very subjective nature, ratings cannot imply a provably false factual assertion.

Nor was the nature of the subjective evaluations changed by the fact that the bar association elected to characterize them as providing solid information giving each judge a report card of his or her strengths and weaknesses., Although the characterization is hyperbolic, given the context in which made, it is, as the foregoing review of the law demonstrates, a permitted exaggeration. The bar association's representation that to assure valid results lawyers must base their evaluation on recent, first-hand experience merely describes the manner in which the bar association intended the lawyers to perform.

It may be that Wheeler was in reality a good judge; but if so, he was nonetheless perceived by those who rated him to be otherwise. The raters had a right to their subjective views, and the bar association had the right to publish those collective impressions.

That being the situation, the judicial performance evaluation was, as a matter of law, not defamatory; Wheeler thus failed to state a defamation cause of action.

3. Other Causes

Wheeler's claim that he also stated other causes of action, as delineated in the last paragraph of part II of this opinion, is predicated on the existence of a cause of action for defamation. Since he failed to state such an action, it necessarily follows that he stated no other cause of action.

IV. JUDGMENT

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

HASTINGS, C.J., not participating in the decision.

WHITE, J., not participating.

APPENDIX B

IN THE DISTRICT COURT
OF CUSTER COUNTY, NEBRASKA
Case No. 3022

ROBERT E. WHEELER,)
Plaintiff,) ORDER
vs.))
NEBRASKA STATE BAR ASSOCIATION,)
Defendant.)

Entered October 7, 1991

NOW ON THIS 21st day of August, 1991, this matter comes on for hearing on the Demurrer filed by the Defendant. The matter is argued, submitted, and taken under advisement.

NOW ON THIS 7th day of October, 1991, this matter comes before the Court after having been taken under advisement. The Plaintiff alleges that the publication of the Judicial Performance Evaluation as it relates to the Plaintiff is libel, *per se*.

He further alleges that the Judicial Performance Evaluation was not properly conducted, that some of the responses were invalid, that more lawyers responded than had personal knowledge of the Plaintiff, that the Defendant failed to investigate the validity of the individual responses, and that the Defendant had reason to know that many of the responses were invalid and the result of and part of a "vindictive" campaign against the Plaintiff. In his brief opposing the demurrer, the Plaintiff further argues that the concluding question, "In your opinion, should this judge be retained in office?", "graphically illustrates it's (sic) politically manipulative purpose: to grant the bar a means of coercing the judiciary in the bar's self-interest."

The Judicial Performance Evaluation poll conducted by the Defendant is by no means perfect. There are no guarantees that the responses are in compliance with the instruction entitled "Qualifications for participation." It is certainly possible for poll results to be skewed by individuals voting who do not have personal knowledge through contact with a judge and only base their vote on hearsay from other attorneys. The questions asked are vague and subject to varied interpretations.

> They put you in a docket, like a defendant, but instead of giving you a bill of particulars, they hand you a list of generalities. It is very difficult to answer nebulous criticism like "We hear you've been rude or abrupt with attorneys". An unidentified judicial candidate in a Los Angeles **County Bar Association evaluation** process quoted in Richard L. Aynes,

Evaluation of Judicial Performance: A Tool for Self Improvement 8 Pepperdine L. Rev. 255 (1981).

Responses may be made by individuals residing outside the judicial district in which the judge resides thereby lessening its value as a tool for the public to use in voting on retention. It does not appear to apply statistical analysis to correctly quantify the results. Under the poll as conducted, greater weight is given the opinion of someone who gives a judge all "ones", the worst rating, than an individual rating a judge "three" or "four" in a particular characteristic, thus rewarding a potentially vindictive voter. (For example, if there were four voters and three give a judge a "three" and one voter gives a judge a "one", the average is 2.5 or "deficient" even though three out of four thought the judge satisfactory.) The potential, at least, for misusing the poll may arise in a situation where a judge is forced to take a position unpopular with attorneys. In addition, the results of the poll may weigh more heavily on judges in the less populated rural areas of the state because of the lack of diversity in the media reporting the results and the lack of other news to, in effect, drown out the results of the poll.

To avoid such difficulties, Colorado has developed a system of evaluation based on citizen committees conducting interviews, observing the judge in question, and reviewing survey results from attorneys and litigants in order to advise the judge of that judge's strengths or weaknesses. This approach accomplishes both purposes sought to be accomplished by the bar poll - giving some information to the public so that they may make an informed choice in retention and giving the judges feedback. See, Anne Rankin Mahoney, Citizen Evaluation of Judicial Performance: The Colorado Experience, 72 Judicature 210 (1989).

But regardless of whether or not the poll conducted in Nebraska is statistically sound, fully reliable, or even fair, or whether the poll is the most effective way of evaluating judges, the true question presented in this case is whether the judicial evaluation poll and the news release that preceded it can be construed as defamatory or whether the publication of the poll is protected by the First Amendment.

The Defendant argues that in commenting upon the judiciary by publishing the poll results the statements it makes are absolutely privileged since they go to improving the judicial process. See, Reller v. Ankeny, 160 Neb. 47 (1955), Sinnett v. Albert, 188 Neb. 176 (1972), Beckenhauer v. Predoehl, 215 Neb. 347 (1983), and Cummings v. Kirby, 216 Neb. 314 (1984). However, while the comments may arguably go to improving the judiciary, it cannot be said that they are part of the judicial function or incident to it. Therefore, the Court finds that such a privilege does not apply to the Defendant.

While the Defendant cites and the Plaintiff relies on Estelle v. Daily News Publishing Co., 99 Neb. 397 (1916) and 101 Neb. 610 (1917), this is an area clearly controlled by federal constitutional law. In New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964) the United States Supreme Court held:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard of whether it was false or not. 376 U.S. at 279.

The reason for such a rule lies in the need for unfettered discussion of public officials and public policy. The Court, quoting the Kansas Supreme Court stated:

> It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than

> counterbalance the inconvenience of a private person whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged. 376 U.S. at 281.

The holding in New York Times Co. v. Sullivan was applied to the individual defendants whose names appeared on the advertisement claimed to be libelous, as well as to the New York Times. Thus, the privilege applies to both individual citizens and the press as an institution.

The decision in New York Times v. Sullivan has been consistently followed by the United States Supreme Court. In Garrison v. Louisiana, 379 U.S. 64, 85

S.Ct 209, 13 L.Ed. 2d 125 (1964), the Court struck down a conviction of a district attorney for criminal libel arising from his accusations concerning judges of the criminal district court. In addition to blaming a large backlog of cases on their "inefficiency, laziness, and excessive vacation" he also stated:

> The judges have now made it eloquently clear where their sympathies lie in regard to aggressive vice investigations by refusing to authorize use of the DA's funds to pay for the costs of closing down the Canal Street clip joints. . .
> . . . . This raises interesting questions about the racketeer influences on our eight vacation-minded judges. 379 U.S. at 66.

The Supreme Court held that the protections afforded in New York Times v. Sullivan also applied in criminal libel actions.

> Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Garrison, 379 U.S. at 73.

Later, in Moniter Patriot Co. v. Roy, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed. 2d 35 (1971), the Court extended the New York Times rule to private actions of public officials or candidates for public office.

This Court recognizes that the retention of judges is not identical to a political election involving two or more candidates. However, to deny that a judge standing for retention is a "political candidate" and, thus, not subject to the same perusal by the public as any other candidate, would be a gross exaltation of form over substance. Thus, the discussion contained in Monitor Patriot v. Roy, should apply to a judge standing for retention.

> Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness of the office he seeks. A clash of reputations is the staple of election campaigns, and damage to reputation is, of course, the essence of libel. But whether there remains some exiguous area of defamation against which a candidate

> may have full recourse is a question we need not decide in this case. 401 U.S. at 275.

Even in those cases that have not expanded the scope of First Amendment protection, the Supreme Court has gone out of its way to reiterate the principles stated in *New York Times v. Sullivan*.

> Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values" and is entitled to special protection. *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, ____, 75 L.Ed. 2d 708 (1982).

Just last term, in *Masson v. New Yorker Magazine, Inc.*, 111 S.Ct. 2419, 115 L.Ed. 2d 447, 59 U.S.L.W. 4726 (1991), the Supreme Court reaffirmed the holding in *New York Times v. Sullivan*:

> The First Amendment limits California's libel law in various respects. When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with "knowledge that it was false or with reckless disregard of whether it was false or not." . . . Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author "in fact entertained serious doubts as to the truth of his publication," . . . or acted with a "high degree of awareness of . . . probable falsity." Citations omitted. 111 S.Ct. at 2430

This Court recognizes that the Supreme Court has not extended the holding in New York Times v. Sullivan to those cases involving private individuals. See Gertz *v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974); *Dun and Bradstreet, Inc. v. Green Moss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed. 2d 593 (1985); and *Philadelphia News Papers v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986). However, in failing to do so, the Court has not abandoned the *New York Times v. Sullivan* rule.

> When the speech is of public concern and the plaintiff as a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. *Philadelphia News Paper, Inc.*, 475 U.S. at 755.

The Plaintiff himself recognizes the nature of poll involved in this case. "Its inclusion (the final question concerning retention) graphically illustrates it's (sic) politically manipulative purpose." And while ill will or bad motives do not form the basis of recovery for libel, the nugget of truth in the Plaintiff's argument sums up the case even if there was bad motive or ill will, i.e., the right to affect political choices, even to manipulate those choices, through speech lies at the heart of the First Amendment guarantees.

Therefore, this Court must review the petition of the Plaintiff to determine whether it states a cause of action in light of the Supreme Court rulings involving public figures and First Amendment guarantees. A review of the Plaintiff's petition fails to uncover any allegation that the Defendant published a false statement with the knowledge that it was false or with reckless disregard of whether it was false or not. It is not sufficient to allege that the defendant "had reason to know" that the poll results were invalid. It is clearly not sufficient to allege a failure to investigate.

> As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. HarteHanks Communications, Inc. v. Connaughton, 491 U.S. 657, 686, 109 S.Ct. 2678, 2695. 105 L.Ed 2d 562, ____ (1989)

Therefore, the Demurrer of the Defendant must be sustained for failure to state a cause of action. However, this decision of the Court as it relates to the New York Times rule, does not fully answer the questions presented by the Demurrer of the Defendant.

The Defendant argues that the Judicial Performance Evaluation was merely a compilation of opinions, and, as such, its publication cannot be the subject of a libel action. If that is true, the burden on the plaintiff to clearly state a cause of action is even greater and the petition must be more closely scrutinized.

The United States Supreme Court expressly held that there is not a separate protection for libel based on the statements being merely "opinion". See Milkovich v. Lorrain Journal Co., 110 S.Ct. 2695, 111 L.Ed.2d 1, 58 U.S.L.W. 4846 (1990).

However, a proper resolution of the issue of whether or not the "onions" expressed in the published poll may form the basis of an action for libel requires a more complete understanding of the Supreme Court's position. This necessitates quoting at length from the decision authored by Mr. Chief Justice Rehnquist.

> We have also recognized constitutional limits on the type of speech which may the (sic) subject of state defamation actions. In Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.E.2d 6 (1970), a real estate developer had engaged in negotiations with a local city council for a zoning variance on certain of his land, while simultaneously negotiation with the city on other land the city wished to purchase from him. A local newspaper published certain articles stating that some people had characterized the developer's negotiating position as "blackmail," and the developer sued for libel. Rejecting the contention that

liability could be premised on the notion that the word "blackmail" implied that the developer had committed the actual crime of blackmail, we held that the "imposition of liability on such a basis was constitutionally impermissible - that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review." Id. at 13, 90 S.Ct., at 1541. Noting that the published reports "were accurate and full," the Court reasoned that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable." Id. at 13-14, 90 S.Ct. at 1541-1542. See also, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50, 108 S.Ct. 876, 879, 99 L.Ed.2nd 41 (1988) (First Amendment precluded recovery under state emotional distress action for ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved"); Letter Carriers v. Austin, 418 U.S. 264, 284-286, 94 S.Ct. 2770, 2781-2782, L.Ed.2nd 745 (1974) (use of the word "traitor" in a literary definition of a union "scab" not basis for a defamation action under federal labor law since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members"). . . . "The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." HarteHanks Communications, Inc. v. Connaughton, 491 U.S. ____, ____, 109 S.Ct. 2678, 2694, 105 L.Ed.2d 562 (1989).

Respondents would have us recognize, in addition to the established safeguards discussed above, still another First Amendment-based protection for defamatory statements which are categorized as "opinion" as opposed to "fact." For this proposition they rely principally on the following dictum from our opinion in Gertz:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no

> constitutional value in false statements of fact." 418 U.S., at 339-340, 94 S.Ct. at 3007 (footnote omitted).

Judge Friendly appropriately observed that this passage "has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question." Cianci v. New York Times Publishing Co., 639 F.2d 54, 61 (CA 2 1980). Read in context, though, the fair meaning of the passage is to equate the word "opinion" in the second sentence with the word "idea" in the first sentence. Under this view, the language was merely a reiteration of Justice Holmes' classic "marketplace of ideas" concept. See Abrams v. United States, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting). ("[T]he ultimate good desired is better reached by free trade in ideas. . . the best test of truth is the power of the thought to get itself accepted in the competition of the market").

Thus we do not think this passage from Gertz was intended to create a wholesale defamation exemption or anything that might be labeled "opinion." See Cianci, supra, at 62, n. 10 (The "marketplace of ideas" origin of this passage "points strongly to the view that the 'opinions' held to be constitutionally protected were the sort of thing that could be corrected by discussion"). Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statement in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly the words "I think." See Cianci, supra, at 64. It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, supra, section 566 Comment a.

Apart from their reliance on the Gertz dictum, Respondents do not really contend that a statement such as, "In my opinion John Jones is a liar," should be protected by a separate privilege for "opinion" under the First Amendment. But they do contend that in every defamation case the First Amendment mandates an inquiry into whether a statement is "opinion" of "fact," and that only the latter statements may be actionable. They propose that a number of factors developed by the lower courts (in which we hold was a mistaken reliance on the Gertz dictum) be considered in deciding which is which. But we think the "breathing space" which "freedoms of expression required in order to survive," Hepps, 475 U.S. at 772, 106 S.Ct., at 1561 (quoting New York Times, 376 U.S., at 272, 84 S.Ct., at 721), is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact.

Furthermost, we think Hepps stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved. Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. Hepps ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.

Next the Bresler-Letter Carriers-Falwell line of cases provide protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. Falwell, 485 U.S. at 50, 108 S.Ct., at 879. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical

> hyperbole" which has traditionally added much to the discourse of our Nation. 110 S.Ct. at 2706.

In his dissenting opinion, joined by Mr. Justice Marshall, Mr. Justice Brennan points out:

> In other words, while the Court today dispels any misimpression that there is a so-called opinion privilege wholly in addition to the protections we have already found to be guaranteed by the First Amendment, it determines that a protection for statements of pure opinion is dictated by existing First Amendment doctrine. 110 S.Ct. at 2707-2708.

It should be noted that the Court in Milkovich made reference to reserving judgment on cases involving non-media defendants based on its decision in Hepps. It must be remembered that those case (sic) involved private individuals and not the public figure exemption as discussed in New York Times v. Sullivan. Non-media defendants are afforded full constitutional protection under New York Times v. Sullivan.

Thus, this Court must review the petition and the Judicial Performance Evaluation and the news release of May 2, 1990 issued by the Defendant to determine if any "provably false factual connotation" appears that would warrant this Court determining that a cause of action would be set out assuming the petition contained an allegation of malice as required by New York Times v. Sullivan. Further, the Court must determine if any of the statements contained in the published poll could reasonably [be] interpreted by the public as stating actual facts.

The Court begins its determination by reviewing the Judicial Performance Evaluation. Evaluate is defined as:

> 2.) To examine and judge concerning the worth, quality, significance, amount, degree, or condition of: appraise, rate. Syn., estimate. Webster's Third New International Dictionary, 1971

Further, reference is made in the news release of May 2, 1990 to the "poll". Poll is defined as:

> 8.) To question or canvass in a poll, to rate. Webster's Third New International Dictionary, 1971.

The Plaintiff argues that the Judicial Performance Evaluation is held out to the public as a judgment based on objective facts, that is, a judge is or is not deficient in the 21 areas listed under the column entitled "Characteristics". Therefore, the public must perceive the poll as stating actual facts about the judge. However, what the evaluation truly is is a subjective analysis that certain lawyers' opinions are that a judge is or is not deficient. By using the term "rate", the poll is clearly indicating that it is a subjective analysis of those individuals who responded to the survey. This is so despite the Defendant's puffing in its news release of May 2, 1990 about "solid information" and "valid results". A poll only purports to show the compilation of opinions, and this Court cannot find that the public would perceive the judicial evaluation to be anything but a compilation of the opinion of the lawyers who rated the judges and not actual fact.

It's difficult for this Court to understand how a rating or appraisal or estimate can carry with it a demonstrably false factual connotation. In essence, the Plaintiff is requesting that the publishers of an opinion poll be determined to be guilty of libel based on the contents of that poll and the responses contained and computed within that poll. In order to do so, the Court would have to determine that the poll is somehow not the subjective judgment of the individuals responding to the poll, but a determination of objective fact that may be provable in court.

It would seem that polls by their very nature are subjective, whether they are performed according to the most rigorous statistical analysis available or completely haphazardly (sic). The determination of libel should not depend on the quality of their method, but on the contents that are published. For example, if Acme Polling Company interviewed ten people standing on the street in El Paso, Texas and published the result of a poll based on those interviews showing that 90 percent of the people thought George Bush was stupid, arrogant, biased, racist, and should be impeached, would he have an action in libel based on its sloppy method? Presumably George Bush would be able to bring in tens of millions of people to say that the results were wrong. Does that mean that the results contain demonstrably false factual connotations? The answer to both questions would seem to be clearly no. Each of the individuals surveyed in the Acme poll would be protected by the First Amendment in expressing their subjective opinions of subjective personality traits, which are, of their very nature, not demonstrably true of false. If the individual who makes the statement is protected, then certainly the publisher of the poll, regardless of how it was conducted, should be protected by the same First Amendment guarantees.

There is no method to objectively prove whether or not an individual judge is deficient in the characteristics rated in the poll. A judge may feel he or she is very intelligent and thereby should be rated high in the first four characteristics. In other words, a judge may say, "I have an IQ of 190, therefore, I should not be called stupid by the individuals responding to the poll." (Of course, if citizens were precluded from calling their political leaders stupid, much of the political discourse in this country would come to a screeching halt.) However, native intelligence and law school standing are not and cannot be totally equated with the first four characteristics, and a negative rating in these areas, based on subjective observations on an individual attorney's own interpretation of the law, does not contain statements with demonstrably false factual connotations.

There is no objective method to determine whether or not an individual judge shows bias or is influenced by either the parties, the attorneys, or the type of case involved as set out in characteristics five through ten. What truly is answered in this area is the subjective analysis of the lawyers responding to characteristics of an individual judge, unknowable by any other but the judge, but subject to a subjective interpretation by an individual attorney. A negative rating in these areas does not contain statements with demonstrably false factual connotations.

There is no objective method to determine whether or not an individual judge is rude or courteous as set out in characteristics 11-13 and 21. This area is based on the perceptions of the lawyers responding, and, like beauty, is in the eye of the beholder. A negative rating in these areas does not contain statements with demonstrably false connotations.

There is no objective method to determine whether and (sic) individual judge is deficient or not in characteristics 14-20 as they relate to specific tasks or the carrying out of the judicial function in specific areas. While some of the areas contained in 14-20 may be analyzed objectively, such as do the records show if the judge was on time or late, it is not the objective fact that is being measured, but the subjective response of attorneys based on their observations of the objective fact. For example on #14 a judge may move his cases along quickly. Subjectively, an attorney may think the judge is giving short shrift to the cases and rate the judge down in that characteristic. For example, on #15, a judge may be punctual in appearing on the bench at the time previously set for court to begin. Subjectively, an attorney may think the judge shuffles papers, talks to the litigants and the lawyers, reads the file, and generally is late and rate the judge down in that characteristic. For example, on #16, a judge may rule and decide each case from the bench. Subjectively, an attorney may think the judge should take more time in deciding cases and rate the judge down in that characteristic. For example, on #17, a judge may stare straight at an attorney making an argument and be paying attention. Subjectively, an attorney may get the impression the judge is not paying attention at all and rate a judge down in that characteristic. For example, on #18, a judge may have a loose management style in trial but effectively moves the trial along and maintains control of the trial. Subjectively, an attorney may be offended by the loose style, ignore that the trial is under control, and rate the judge down in that characteristic. For example, on #19, a judge may struggle to be extremely conscientious in deciding a case. Subjectively, an attorney may think the judge is not being efficient in wasting time on the case and rate the judge down in that characteristic. For example, on #20, a judge may write a lucid and comprehensive opinion in a case. Subjectively, an attorney may think the opinion is vague and misses the point entirely and rate the judge down in that characteristic.

This is not to say that the subjective conclusions of the attorneys are always correct. They may, in fact, be totally inaccurate as an appraisal of a particular judge. In this area, however, there is no way to prove or disprove subjective analysis. It would be similar to trying to prove that Picasso was a greater painter than Dali. One could argue Picasso's technique was better, his vision broader, his influence greater. But an individual who appreciates Dali more cannot be proved objectively wrong in his or her subjective analysis. In a similar vein, one cannot prove that because he had a higher IQ, Goethe was a greater writer than F. Scott Fitzgerald. So, too, a judge cannot prove that he or she should be highly rated because he or she is smarter than another judge or because he or she did better in law school than another judge. A judge cannot prove that he or she should be highly rated because he or she is fairer because of having studied philosophy. A judge cannot prove that he or she should receive more votes for retention because he or she is a "better" judge.

It is impossible to objectively analyze and prove that the results of a poll such as the one contained in the evaluation contain demonstrably false factual connotations. If one could do so, there is nothing to prevent an action in libel by a judge who feels he or she may be able to prove that he or she should have received all fives instead of fours.

The Plaintiff is asking this Court to proceed on this Petition even though the poll is subjective and does not contain statements with demonstrably false factual connotations as would the statement "Mayor Jones is a liar." In essence, what we have in the Judicial Performance Evaluation, are statements that Judge Jones may be dumb, arrogant, biased, impolite, impatient, arrogant, inefficient, tardy, inattentive, out of control, inefficient and unconscientious, writes poorly, is hypocritical, and should not continue to be judge. Under Milkovich such allegations are not actionable as a matter of law.

Therefore, the Court finds, based on Milkovich, that the Petition fails to state a cause of action in libel for the Defendant's publishing the judicial evaluation poll since the poll does not contain statements with demonstrably false factual connotations.

The Court realizes that it will be difficult for the Plaintiff to amend his Petition to state a cause of action. The Court recognizes that it is within its discretion to find that the defect in the pleadings cannot be remedied. However, the Court will allow the Plaintiff twenty days to amend its Petition as it relates to the sustaining of the Demurrer in regard to the failure to plead facts constitution malice as required by New York Times v. Sullivan, and as it related to the determination of this Court as to the failure to make allegations that the Judicial Performance Evaluation contains demonstrably false factual connotations and would be seen by the public as stating actual facts.

The Court recognizes that a harsh result may flow from its ruling in this matter. The Court has no objective way of knowing the motivations of the lawyers responding in this poll. Certainly, this Court has no way of knowing whether the rating of the Plaintiff was correct or incorrect or was the result of his merely performing the duties required by law and, thereby, alienating the lawyers who were to vote in the poll. The Court does recognize that the judicial evaluation poll as used presently has the potential for being misused as the Plaintiff claims that it was in this case and, if the poll was misused, then the Plaintiff may have, in fact, been treated unfairly. If that is the case, then the Plaintiff is correct in his assertion that no forum is available to him to resolve that unfairness.

What this Court does know, however, is that the Constitution of the United States of America, within the First Amendment, precludes an action for libel as pleaded in the Plaintiff's Petition, regardless of whether or not that result appears to be fair.

Our system of laws and enforcement of those laws gives great weight to the individual and takes great care to provide to the individual an avenue for redress of any harms suffered at the hands of others. There are, however, occasions when that high esteem for the individual must give way. The area of protection of the freedom of speech of citizens as it relates to public officials is one of those areas.

Thomas Jefferson said, "When a man assumes a public trust, he should consider himself public property." He recognized that public officials surrender certain rights because of the public's great interest in being free to comment upon and occasionally criticize officials, including judges.

> Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively". James Madison quoted in HarteHanks Communications, Inc., supra , 491 U.S. at 686.

In New York Times v. Sullivan, Mr. Justice Black, joined by Justice Douglas stated in their concurring opinion:

> We would I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the

people and the press free to criticize officials and discuss public affairs with impunity. This Nation of ours elects many of its important officials; so do the States, the municipalities, the counties, and even many precincts. These officials are responsible to the people for the way they perform their duties. While our Court has held that some kinds of speech and writings . . . are not expressions within the protection of the First Amendment, freedom to discuss public affairs and public officials is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion. To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. "For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it." An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment. 376 U.S. at 296-297.

Therefore, for the reasons stated above, the Court finds that the Demurrer of the Defendant should be sustained and the Plaintiff given 20 days to amend. The defendant is given 10 days thereafter to plead further or 20 days to answer.

SO ORDERED.

BY THE COURT:
John P. Murphy
District Judge

APPENDIX C

IN THE DISTRICT COURT
OF CUSTER COUNTY, NEBRASKA

Case No. 3022

ROBERT E. WHEELER,)
Plaintiff,)
vs.)) ORDER
NEBRASKA STATE BAR ASSOCIATION,)
Defendant.)

Entered February 28, 1992

NOW ON THIS 18th day of November, 1991, this matter comes before the Court for hearing on the Demurrer of the defendant. The demurrer is argued, submitted and taken under advisement.

NOW ON THIS 28th day of February, 1992, this matter comes before the Court after having been taken under advisement. The Amended Petition of the Plaintiff must be reviewed to determine whether it alleges facts which set out a cause of action against the Defendant for libel. In making this determination, the Court takes into account the May 2, 1990 "NSBA News Release" even though that new(s) release preceded the alleged libel by more than two months and no showing was made that the "NSBA News Release" was reissued on the date that the bar survey results were released to the new(s) media.

There are two aspects of the petition presented for the Court's determination as to whether or not the demurrer should be sustained. The first aspect deals with the opinions expressed in the poll. This Court has previously addressed the issue of whether or not the questions contained in the poll and response to the poll are protected speech which may not be subject of a defamation claim.. It is the Court's determination that the poll questions and results setting out the opinion of the members of the bar who responded are protected speech. Had an individual attorney or group of attorneys issued a news release stating that Judge X is not polite, does not know the law, is lazy, and should not be retained, that "opinion" would be clearly protected speech for it is about a public official and is not provable false nor contains a provable false connotation. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 111 L. Ed. 2d, 58 U.S.L.W. 4846 (1990).

A number of courts have had an opportunity to deal with cases post Milkovich. The Ninth Circuit Court of Appeals dealt with such a situation in Unelko Corp. v. Rooney, 912 F. 2d 1049 (1990)

> In Milkovich, the court rejected the view that "an additional separate constitutional privilege

> for 'opinion' is required to insure the freedom of expression guaranteed by the First Amendment." Thus, the threshold question in defamation suits is not whether a statement "might be labeled 'opinion'", but rather whether a reasonable fact finder could conclude that the statement "imp[ies] an assertion of objective fact". (Citations omitted). Unelko, at 1053.

In a footnote the Ninth Circuit observed:

> It is worthy of note that the Supreme Court's test leaves protected the category of speech known as "pure opinion"-that is, statements that do not imply facts capable of being proved true or false. Milkovich, at 2708 (Brennan, J., dissenting). Thus,

> there remains much truth in the old adage: "You should not say it is not good. You should say you do not like it, and then, you know, you're perfectly safe." Workman Quote-a-Day calendar at June 26, 1990 (Quoting James MacNeil Whisler).

The D. C. Circuit, in White v. Fraternal Order of Police, 909 F. 2d 512 (1990) stated:

> Assertions of opinion on a matter of public concern can only receive full constitutional protection if they do not contain a provable false factual connotation. In other words, even with a *per se* opinion, the question is whether the person has made an assertion that can reasonably be understood as implying provable facts.

> (Citations omitted). White, at 522.

In a case similar to the one presented to this Court, the California Appellate Court determined that the statement that an individual was the "worst teacher" in a school, among other things, would receive constitutional protection and that words must be understood in a defamatory sense before an action could be brought for libel. Moyer v. Amador Valley Joint Union High School District, 275 Cal. Rptr. 494 (1990). The Court held: "as to the third or 'worst teacher' statement, there is no factual assertion capable of being proved true or false". Moyer at 497. So too, in the instant case, the assertions contained within the poll are not capable of being proved true or false.

The Minnesota Supreme Court has applied pre-Milkovich decisions determining what does or does not constitute an opinion in order to arrive at a conclusion whether such "opinion" statements were protected. In Hunt v. University of Minnesota, 465 N.W. 2d 88 (1991), the Minnesota Supreme Court stated:

> The United States Supreme Court recently determined freedom of expression "is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and 'fact'." Milkovich v. Lorain Journal Co., __ U.S. __, __, 110 S. Ct. 2695, 2706, 111 L. Ed. 2d 1 (1990). After stating the appellate Courts' fact/opinion analysis mistakenly relied on dicta in Gertz, the Supreme Court said all statements of opinion are not automatically protected by the First Amendment. Id. at ____, 110 S. Ct. at 2705. Citing existing

law, the Supreme Court clarified that only statements regarding matters of public concern which are not sufficiently factual to be capable of being proven true or false and statements which cannot be reasonably interpreted as stating actual fact, are absolutely protected by the First Amendment. Id. at ___, 110 S. Ct. 2706-07. Thus, contrary to Hunt's argument, Milkovich did not abolish constitutional protection for opinions, but instead merely narrowed the privilege.

The test used in Milkovich to identify protected opinions is very similar to the four-factor inquiry used by the circuit courts to distinguish fact from opinion. Specificity and verifiability are closely related to whether a statement is capable of being proven false. Where a remark can be

> reasonably interpreted as stating actual facts must be inferred from the political, literary and social context in which the statements were made. Hunt, at 92.

The Circuit Court opinions referred to in Hunt arose originally Ollman v. Evans, 750 F. 2d 970 (1984).

> While courts are divided in their methods of distinguishing between assertions of fact and expressions of opinion, they are universally agreed that the task is a difficult on. * * * To be sure, paradigm examples of statements of fact, on the one hand, and paradigm examples of expression of opinion on the other, can be contrasted. clearly, in the former category are assertions that describe present or past conditions capable of being known through sense impressions. * * * It is

rather hard to imagine a context in which the statement, "Mr. Jones had ten drinks at his office party and sideswiped two vehicles on this way home," could be deemed to be a statement of opinion. At the other extreme are evaluative statements reflecting the author's political, moral or aesthetic views, not the author's sense perceptions. A statement such as, "Mr. Jones is a despicable politician," is a paradigm opinion.

* * * To evaluate the totality of the circumstances of an allegedly defamatory statement, we will consider four factors in assessing whether the average reader would view the statement as fact or, conversely, opinion. While necessarily imperfect, these factors will, we are persuaded, assist in discerning as systematically as possible

what constitutes an assertion of fact and what is, in contrast, an expression of opinion.

First, we will analyze the common usage or meaning of the specific language of a challenged statement itself. Our analysis of the specific language under scrutiny will be aimed at determining whether the statement has a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite an ambiguous. * * * Readers are, in our judgment, considerably less likely to infer facts from an indefinite or ambiguous statement then one with a commonly understood meaning. Second, we will consider the statement's verifiability - is the statement capable of being objectively characterized as true or false? * * * Insofar as a

> statement lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content. Ollman, at 978-979 (Citations omitted).

Ollman was relied upon by the Eighth circuit in Price v. Viking Penguin, Inc., 881 F. 2d 1426 (1989):

> Assertions whose elements are unverifiable, including statements regarding motive, are "intrinsically unsuited" to serve as a basis for libel. Where quantification for a general assertion is impossible, allowing any fact-finder to decide its truth or falsity invites the exercising of personal dispositions regarding "the contents of the statements, its author, or its subject".

Specificity and verifiability thus function as limits on majoritarian bias and government intervention." Price, at 1432.

In the instant case, while there may be some argument whether or not the language of the poll has a precise core of meaning, it is clear that there can be no analysis of the statements contained within the poll which shows that the statements are capable of being objectively characterized as true or false; it is clear that they completely lack a plausible method of verification; and it is clear that they are not subject to any quantification to determine truth or falsity.

This Court recognizes that most appeals in this area of libel arise out of rulings on motions for summary judgment, and that the questions presented on a demurrer are different than those presented on a motion for summary judgment. No evidence has been adduced in the instant case for this

Court to review. However, the Court is still bound to examine the Petition to determine whether is states facts sufficient to set out a cause of action for defamation against the Defendant.

In Kahn v. Bower, 234 Cal Rptr. 244 (1991), the California Appellate Court stated:

> The question whether challenged statements convey the requisite factual imputation is ordinarily a question o;f law for the court. Kahn, at 249.

The same rule was expressed in 600 West 115th Street v. Von Gutfeld, 572 N.Y.S. 2d 655.(1991).

> Almost four years before the Milkovich v. Lorain Journal Co., supra, decision, the Court of Appeals held that, in New York State defamation actions, the determination of "whether a given statement expresses fact or opinion * *

> * is one of law for the court and one which must be answered on the basis of what the average person hearing or reading the communication would take it to mean * * * [citations omitted]. There is no definitive test or set of criteria * * * [citations omitted]. The essential task is to decide whether the words complained of, considered in the context of the entire communication and of the circumstances in which they were spoken or written may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion * * * [citations omitted]. 600 West 115th Street, at 658.

It is not necessary to reviews (sic) this Court's previous analysis of the poll under Milkovich as set out in its Order of October 7, 1991. The Court once again determines that in regards to the poll itself, the Plaintiff fails to state a cause of action since the poll does not contain statements that are provably false or have a provably false connotation.

The other aspect of the petition which this Court must consider is the allegation that the poll methodology gives rise to a claim for libel. While the poll itself is a compilation of speech that is protected, it would be possible to commit libel if the results of a particular poll were misreported or if the reporter knew the poll was false. For example, if the publisher of a poll knew that individual respondents to that poll lied and still printed the result, or if the publisher of the poll printed false results of the poll, that is saying 60 persons responded when in fact only 12 did, that may constitute a libel which would be actionable.

In a case similar to the one presented to this Court, the California Appeals Court affirmed a lower court's sustaining of a motion for summary judgment arising from a claim against a television station which aired the results of a poll it commissioned. Aisenson v. American Broadcasting Co., Inc. 269 Cal. Rptr. 379, 220 Cal. App. 3d 146 (1990). In this case, CABC-TV aired the results of a poll it conducted from local attorneys about judges in the Los Angeles Superior Court Criminal Division. ABC reported that the plaintiff was the lowest rated judge in the poll. The attorneys who were polled were asked to rate the judges on a scale of one to ten, ten being the highest, and to only evaluate those judges that they had enough experience with to form a fair evaluation. The poll asked the following six questions which are similar in nature to the questions contained in the NSBA poll:

1) Does he/she have the appropriate demeanor, temperament, courtesy to be a judge?
2) Is he/she usually decisive
3) Does he/she make efficient use of court time?
4) Does he/she tend to impose appropriate sentences?
5) Does he/she know the law?
6) What overall rating would you give the judge?

The television station reported in three broad cases that the plaintiff was the lowest ranking judge in the survey. In discussing the ruling on the motion for summary judgment made at the trial level, the California Appellate Court stated:

The poll in this case reflected the opinions of the attorneys who participated in it, and those opinions are protected regardless of whether they are well founded or utterly wrong. (Botos v. Los Angeles County Bar Assn. (1984) 151 Cal. App.3d 1083, 1089, 199 Cal. Rptr. 236). The newscast itself, on the other hand did not on its face reflect ABC's opinion about the judges in the criminal division; rather, ABC presented the opinions of the attorneys as facts and not as editorial comment or criticism. (Grillo v. Smith, supra, 144 Cal. App 3d 868, 874-875, 193 Cal. Rprt. 414). Merely making unflattering factual statements about someone, without more, does not give rise to a cause of action for defamation. For these factual statements to be actionable, there must be some proof not only that they tended to impute a lack of professional ability, but also that the objected-to statements were false; obviously a true statement of fact is not defamatory (Citations omitted)

In this case, there is no evidence that respondents aired false statements of fact. ABC delivered 1500 ballots to the presidents of three bar associations -Los Angeles Public Defenders' Association, the Los Angeles Deputy District Attorneys' Association and the Los Angeles Criminal Bar Court's Bar Association-for (sic) distribution to their members.

Over 500 completed ballots were returned for tabulation. For this purpose, ABC employed a company which performs public opinion research analyses for use by the broadcast media. 1The completed ballots were first keypunched onto data processing cards, which were in turn loaded into a computer for analysis. ABC's polling expert recommended that a minimum of 35 responses would ensure that a judge was rated by a statistically valid number of persons in the survey population; as a precaution, ABC only rated those judges who had been evaluated in 50 ballots. Appellant was evaluated by 123 of the attorneys to whom ballots were sent.

Appellant intimates that the facts aired by ABC may have been false because the ballots were tabulated outside the view of respondents or their agents. In the fact of respondents' declarations averring the ballots were properly handled and tabulated, it fell to appellant to present some evidence to the contrary. This he failed to do. He presented absolutely no evidence that the completed ballots were tampered with, or that the data processing cards inaccurately encoded the information contained in the ballots, or that the computer printout did not reflect the opinions expressed by the attorneys being polled. In the absence of any evidence that the ballots and computer tabulations were falsified, we must conclude that ABC's statements conveying to the public the results of the poll were truthful and accurate. The printout itself plainly shows that appellant received the lowest overall score of all the judges whose names appeared on the ballot. Accordingly, none of ABC's statements that the appellant received the lowest core in any one or most of the categories listed in the ballots is actionable because they are not false statements of fact.

Aisenson, at 155-156.

In order for the Plaintiff to state a cause of action, it would be necessary to allege that the defendant, printed results that it knew were statistically false or with reckless disregard of whether they were true or false. In other words, when the Defendant printed these statistical results did the Defendant entertain serious doubts as to the truth of those results or did it act with a high degree of awareness of probable falsity of the statistical results of the NSBA Judicial Performance Evaluation. See, Masson v. New Yorker Magazine, Inc., 111 S.Ct 2419, 115 L.Ed. 2d 447, 59 U.S.L.W. 4726 (1991). The closest thing to such an allegation is contained in paragraph 24 of the Amended Petition. However, the Court reads that paragraph as an iteration of the allegation that the responses were invalid assertions of the Plaintiff's abilities, not invalid as to the maliciously false reporting of statistically wrong results.

The California Court further discussed methodology in Aisenson.

> Appellant argues that malice is demonstrated in respondent's failure to conduct a "scientifically controlled evaluation of judicial performance.": This argument is difficult to fathom. Unlike bacteria, judges cannot be placed in Petri dishes and examined under a microscope. Virtually every assessment of judicial performance - short of a purely numerical comparison of verdicts or sentences or of affirmance and reversal rates - must rely on the subjective opinions of observers. Such subjectivity inevitably bears the risk of bias, misperception and prejudice. Still, the risk that some of the 1,500

attorneys to whom ballots were sent harbored resentments against the judges being rated does not take the assessment endeavor outside the protection of the First Amendment. If we were to say that it does, we would in effect be endorsing the abolition of every opinion poll addressing the performance of politicians and candidate for public office. This prospect is one we cannot accept. Nothing in this record causes us to believe that those asked to rate a public official are all lying about their familiarity with the official's performance or conspiring to damage that official's career. Moreover, we trust that the viewers of any broadcast reporting the results of an opinion poll have enough intelligence to be aware of the limitations inherent in the poll and to draw their own conclusions as to the weight the poll should carry. Aisenson, at 159.

Thus, the Court finds that the Amended Petition fails to state a cause of action in regard to the methodology of the poll.

The Plaintiff argues that the Defendant, because it is an arm of the Judicial Branch of government, should owe a higher duty to the Plaintiff to the extent that due process should have been afforded the Plaintiff prior to the publication of the poll. Whether or not the Plaintiff was entitled to due process considerations because of the nature of the publisher of the poll is not a question properly before the Court. The Amended Petition sounds in libel, not in a deprivation of constitutional rights. This Court has discussed the general question of the fairness of the poll in its previous order. Whether or not the Defendant owes the Plaintiff a constitutional duty of fairness through the Due Process Clause of the United States Constitution or of the Nebraska Constitution may not be answered at this time.

The Plaintiff takes exception to the use of the word "puffing" in the previous order of this Court. While the word was perhaps inartfully used, the Court sought to convey the concept that the general public would not believe the poll to be anything other than the opinion of the respondents despite the statements of the Defendant in it (sic) news release.

While much of the discussion of libel is based on the interpretation of the United States Constitution, the Nebraska Constitution may provide alternative and separate grounds for protecting such speech.

> Milkovich and its predecessor Gertz v. Robert Welch, Inc., 418 U.S. 1323, 94 S. Ct 2997, 41 L. Ed. 2d 789, merely established and shaped the constitutional floor below which state defamation rules may not fall.
>
> Immuno Ag. v. Moor-Jankowski, 567 N.E. 2d 1270, (1991), Titone, J., concurring.

Thus, if necessary, this Court is willing to apply independent state constitutional grounds in order to afford protection to the speech in question, and to hold that a separate protection for "opinion" concerning public officials not recognized by the United States Supreme Court exists by virtue of the Nebraska Constitution.

Therefore, for the reasons stated above, the Court finds that the Demurrer of the Defendant should be sustained. The Plaintiff is given 20 days to amend. If the Plaintiff wishes to stand on his

Amended Petition and not amend within 20 days, the Court will, upon motion, dismiss the Amended Petition.

SO ORDERED

John P. Murphy

District Judge

APPENDIX D

IN THE DISTRICT COURT

OF CUSTER COUNTY, NEBRASKA

Case No. 3022

ROBERT E. WHEELER,)
Plaintiff,) AMENDED
vs.)) PETITION
NEBRASKA STATE BAR ASSOCIATION,)
Defendant.)

COMES NOW the plaintiff, Robert E. Wheeler, and states and alleges as follows,

1. That in the Spring of 1987 the plaintiff was qualified and nominated by the Nominating Committee of the Twentieth Judicial District, was appointed by Governor Kay Orr, and was sworn, and installed as County Judge for the Twentieth Judicial District, State of

Nebraska with primary service center in Broken Bow, Custer County, Nebraska; that he served in that capacity until the end of his term on January 3, 1991.

2. That during all times mentioned herein, the Nebraska State Bar Association was an association organized and administered by the Supreme Court of the State of Nebraska for the stated purpose of "advancement of the administration of justice according to the law, and for the advancement of the honor and dignity of the legal profession, and encouragement of cordial intercourse among the members thereof, [and] for the improvement of the service rendered the public by the Bench and Bar."

3. That on or about May 2, 1990 the defendant issued to its non-judicial members a form entitled NSBA Judicial Performance Evaluation - 1990, which was

internally referred to as "evaluation forms", and the recipient was called upon to "evaluate" members of the state and federal judiciary in the State of Nebraska in 21 performance characteristics:

5=Excellent (performance is outstanding)
4=Good (performance is above average)
3=Satisfactory (performance is adequate)
2=Deficient (performance is below average)
1=Very poor (performance is well below average and unacceptable)

4. That on the same day, May 2, 1990, the defendant made a "NSBA NEWS RELEASE" to the news media of the State of Nebraska headed "Lawyers to rate judges' performance" in which the defendant made the following claims of fact:

a. that Nebraska lawyers would have an opportunity to "evaluate the performance of state and federal judges . . .

b. that, quoting the chair of the committee responsible for the evaluation instrument and method, the judicial performance evaluation had a two-fold purpose:

> "The poll gives voters solid information about the judiciary to help them make informed decisions on judges standing for retention this November," he said.
>
> "Secondly, it gives each judge a report card of his or her strengths and weaknesses";

c. that "Using a scale from one-to-five, lawyers will evaluate judges on characteristics like knowledge and application of the law, absence of bias or prejudice, efficiency in docket management and patience and courtesy";

d. and the News Release purported that the results would be valid:

> To assure valid results, lawyers must base their evaluation on recent, first-hand experience

with the judge (in the case of trial court judges) or on familiarity with the judge's opinions (in the case of appellate judges).

5. That the defendant undertook to validly evaluate the judicial performance of judges, including the plaintiff, through the use of the survey method.

6. That in 1990 there had developed through the United States a commonly recognized science concerning factual research, evaluation and valid conclusions to be drawn from the survey method, including the polling method, collection of data and interpretation of data; and that this science was known to the defendant and available to the defendant.

7. That the defendant claims that the members of its Judicial Committee prepared the survey format and methods, and that

they were "experts" in how to fairly design a format and method of evaluating judges; but the defendant admits that "No individuals specializing in statistics, or opinion polls as a field of study, were consulted."

8. That the defendant admits that it did not establish for the returned evaluations a mean, nor a standard of deviation to test the results, but that such are tools recognized in the field of survey science as tools to test the validity of the results obtained; nor did it apply any other statistical tool available to it to test the validity of the results which it obtained.

9. Further that the defendant admits that "the defendant did not interpret the date collected nor was it modified or altered in any manner. It was reported as received."

10. That the defendant's conduct in performing the evaluation by survey was with reckless disregard of the truth or falsity of the result obtained.

11. That the defendant is neither a salesperson nor in the business of sales, nor were the results of the judicial performance evaluation sold; and that the above claims of fact were claims for the factual validity and integrity of the judicial performance evaluation, and not mere commercial "puffing":

a. That as used in its May 2, 1990 News Release the word "solid" was commonly understood by the public to mean that the results were substantial, firm, strong, sound, complete, thoroughgoing, filled with matter beneath the surface.

b. That as used in its May 2, 1990 News Release the word "information" was commonly understood by the public to mean facts that are gathered.

c. That as used in its May 2, 1990 News Release the word "assures" was commonly understood by the public to mean a guarantee, certainty, a confident promise.

d. That as used in its May 2, 1990 News Release the phrase "report card of his or her strengths and weaknesses" was commonly understood by the public to mean an determination of a judge's strengths and weaknesses based upon factual evidence.

12. That the defendant assured the public that its judicial performance evaluation would be fair, valid, and solidly based upon the facts of the judge's judicial performance.

13. That on June 29, 1990 the defendant, by its President, sent to the

members of the judiciary in the state of Nebraska, including the plaintiff, the results of that judicial performance evaluation, with a cover letter which stated, in part, the following:

> . . .
>
> Response to the survey improved again this year. The Bar received evaluation forms from 1,165 layers. Another 649 returned the postcard indicating they were ineligible or unwilling to participate. The total represents a 44.5% response rate, compared to 42.1% in 1988, 39.8% in 1986 and 13% in 1984.
>
> This information is provided to you now so you may review it before it is made public Friday, July 13. Copies of the summary alone will be mailed to Nebraska news media Thursday, July 5.

14. That a copy of the June 29, 1990 letter mentioned in paragraph 13 is attached as Exhibit A to the original Petition and incorporated herein by this reference.

15. That the defendant, by its President, included with the mailing of the letter of June 29, 1990, a summary of the bar evaluation of the judiciary, a copy of which is attached as Exhibit B to the original Petition and incorporated herein by this reference.

16. That the defendant, by its President, also included with the mailing of the letter of June 29, 1990 to the plaintiff a computer print-out of the evaluation responses to his judicial performance, a copy of which is attached hereto as Exhibit C to the original Petition and incorporated herein by this reference.

17. That ethical restraints of the defendant prohibit members from answering the evaluation with respect to a judge and with respect to individual characteristics listed, if the member has not had sufficient experience with the judge's performance and character trait named in the evaluation reasonably to have an objective and personal opinion; but that the defendant in gross disregard for the truth and validity of its results, mailed evaluation forms on the plaintiff to all of its active members.

18. That more lawyers responded to the evaluation of the plaintiff than did lawyers respond to the survey of other judges with comparable judicial work loads and exposure.

19. That more lawyers responded to the evaluation of the plaintiff than there were lawyers who appeared before the

plaintiff on a sufficient basis to form an opinion on the 21 characteristics surveyed.

20. That from statistics published by the bar concerning the percentage of lawyers responding to the evaluation, the number of lawyers responding to the evaluation of the plaintiff was grossly in excess of the number that statistically had sufficient information to answer the survey concerning the plaintiff.

21. That the evaluation forms returned and evaluating the plaintiff showed a minimum of 7 lowest ratings of 1 in each characteristic category, and as many as 26 lowest ratings in a characteristic category.

13. That the defendant made no effort to investigate the validity of the individual lawyer evaluation responses concerning the plaintiff which it has

solicited for purposes of a valid report of the plaintiff's judicial performance, nor does it have any standards to assure fairness and validity in its survey form and method; rather, defendant included all survey returns in the published results without regard to the truth or validity of the statements obtained.

23. That members o;f (sic) the defendant acted together in a concerted effort to defame the plaintiff through the Judicial Performance Evaluation, and that by inclusion of obviously invalid and vindictive returns in the published evaluation results, the defendant willingly acted in concert with its members to defame the plaintiff.

24. That it was obvious to the defendant that many of the individual lawyer evaluation responses concerning the plaintiff were invalid, not true, not

factually based, and that the responses obtained were part of a concerted effort among its members to act cooperatively through the evaluation to defame the plaintiff; but that the defendant nonetheless included those survey responses in its published survey summary.

25. That the plaintiff's history of academic and performance characteristics is shown in plaintiff's resume, attached to the original Petition as Exhibit D, and incorporated herein by this reference.

26. That on July 5, 1990 the defendant released and published to the Nebraska news media the summary of the bar survey, including that of the plaintiff, for written, printed and oral release to the public of the State of Nebraska on July 13, 1990.

27. That defendant released and published the Judicial Performance

Evaluation with "actual malice" as defined in New York Times Co. v. Sullivan, 376 U.S. 254 at 279 (1964): "that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

28. That on July 13, 1990 the Nebraska news media did publish orally and in writing the results of the defendant's judicial performance evaluation of the plaintiff to members of the public throughout the State of Nebraska, and in Custer County, Nebraska.

29. That the published survey defames the plaintiff in his character, his profession, and in his office of trust.

30. The published bar survey is libel per se.

31. That one of the purposes of the bar survey is to be used in the retention elections of the individual judges, but

that only a third, approximately, of judges who are "evaluated" in the survey are scheduled for retention vote at the next election.

32. That the survey was used as the basis of further libel and defamation in a campaign against the retention of plaintiff, which use and abuse the defendant could reasonably have foreseen:

a. An advertisement appearing in the Custer County Chief on November 1, 1990 is attached hereto as Exhibit E, and incorporated herein by this reference.

b. The same advertisement appeared in other newspapers in the Twentieth Judicial District in the last weekly publication before the retention election of the plaintiff.

33. That judicial ethics precludes the judge from campaigning for retention until a campaign is activated against the judge;

and then the judge may not directly solicit support, but must do it through an organization which must be developed to maintain secrecy concerning the contributors; that the plaintiff had no opportunity to defend himself against the advertisements alleged in paragraph 21, nor to promote his retention against the defamation of the defendant.

34. That the plaintiff was subject to retention election in the twentieth judicial district on November 6, 1990, and that had he been successful in that election, he would have been retained for an additional term of six years.

35. That the plaintiff lost the retention election in the Twentieth Judicial district by a margin of 173 votes of a total of 8,861 votes cast; and that the published defamatory statements of the defendant was a proximate contributing

cause of the plaintiff's loss of retention election.

36. That the plaintiff applied for two judicial positions in March, 1991.

37. That to defend himself against the first allegation of the advertisements against plaintiff alleged in paragraph 21, plaintiff sought from the defendant a copy of plaintiff's testimony on behalf of George Rhodes in the disciplinary proceeding of the Nebraska State Bar Association against Mr. Rhodes conducted before the Committee on Inquiry, 6th Judicial District, which action resulted in Mr. Rhodes' Supreme Court-ordered Suspension from practice for three years. That a copy of the request is attached to the original Petition as Exhibit F and incorporated herein by this reference.

38. That the stated purpose of the request mentioned in paragraph 37 was to

defend the allegation of the advertisements alleged in paragraph 21.

39. That by letter dated February 18, 1991 the defendant refused to release a transcription of the plaintiff's testimony for Mr. Rhodes, and by that action prevented the plaintiff from defending his character from the accusations of the bar judicial performance evaluation and from those of the advertisements alleged in paragraph 21. A copy of the denial is attached to the original Petition as Exhibit G and incorporated herein by this reference.

40. That as a proximate result of the published defamatory statements of the defendant, although the plaintiff has distributed approximately 250 resumes, he has received no offer of a permanent job; nor was he nominated for either judicial position for which he had applied in

March, 1991.

41. That as a proximate result of the published defamatory written statements of the defendant, and its action which has denied the Plaintiff effective mitigation of these damages, the plaintiff has suffered the following special damages:

$30,000	Loss of income 1991 to date of filing
$20,000	Projected loss of income the balance of 1991
$125,000	Projected loss of income balance of six year term
$27,407	Loss of health insurance benefits
$30,000	Projected loss of judges' retirement benefits
$222,407	Total special Damages

42. That as a proximate result of the defamatory written statements of the defendant, and its actions which have

aggravated these damages, the plaintiff has suffered general damages to his good reputation in his community, among his professional friends, associates and peers, and in the general public throughout the State of Nebraska.

43. That the defendant has through its libel taken from the plaintiff his good reputation in the profession and in his community without due process of law, which principle is the cornerstone of the legal profession which the defendant purports to lead in the State of Nebraska.

44. That the 1990 NSBA Judicial Performance Survey violated the fundamental principle under federal and state law of independence of the judiciary in that the defendant now claims that the evaluation was merely the opinion of its members, but when it was published the defendant assured the public that it was

solid information and valid, based upon the facts; and that by reason thereof, all judges whose priority is to protect job security and remain in the judicial profession are coerced to conform to the desires, demands and whims of the members of the bar association as a condition of retention, and to protect the interests of the bar which will evaluate that judge; and the threat of future public evaluations by the defendant of judicial performance continues to chill the plaintiff's right to a fair trial before an impartial and independent tribunal.

45. That the above-alleged actions of the defendant has deprived the plaintiff of his federal rights to procedural and substantive due process, to the damage of the plaintiff.

WHEREFORE, plaintiff prays for judgment against the defendant for special damages in the amount of $222,407; for general damages; for a temporary and permanent injunction against the defendant precluding the defendant from further "evaluations" of judicial performance as a violation of federal and state law protecting independence of the judiciary, for damages for violation of the plaintiffs rights, for costs of action, as provided by law, and for such other and further relief as to the court seems just and equitable.

REQUEST FOR JURY TRIAL

The plaintiff requests that this cause be tried by jury.

Dated this 9th day of October, 1991.

By Robert E. Wheeler
Attorney at Law #16168
511 No. 10th Ave.
Broken Bow, NE 68822
Phone No. (308) 872-5545

Supreme Court, U.S.
FILED
APR 15 1994
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No. 93-1499

In The
Supreme Court of the United States
October Term, 1993

◆

ROBERT E. WHEELER
Petitioner,

v.

NEBRASKA STATE BAR ASSOCIATION,
Respondent.

◆

**On Petition For A Writ of Certiorari
To the Nebraska Supreme Court**

◆

BRIEF FOR RESPONDENT IN OPPOSITION

◆

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

At pages 2 and 3 of the Petition for Writ of Certiorari, Petitioner cites only the First, Fifth and Fourteenth Amendments to the United States Constitution as the relevant constitutional and statutory provisions (required by Sup. Ct. R. 14.1(f) to be set forth verbatim). It should be noted that Petitioner does *not* assert, either in his reference to relevant constitutional and statutory provisions or in his articulation of the questions presented for review, that his state court petition asserted a cause of action under 42 U.S.C.A. §1983 (1981).

STATEMENT OF THE CASE

The opinion of the Supreme Court of Nebraska which Petitioner asks the Court to review is set forth as Appendix A to the Petition for Writ of Certiorari at pages 61 through 89. (Petitioner's Appendix A) In its decision, the Nebraska Supreme Court affirmed the dismissal of Petitioner's amended petition. Such dismissal was entered by order of the District Court of Custer County, Nebraska on March 20, 1992. Said order is reproduced as Respondent's Appendix A. Said order was issued after the Petitioner elected to stand on his amended petition following the district court's order on February 28, 1992 sustaining Respondent's demurrer to Petitioner's amended petition. Petitioner's election to stand is reproduced as Respondent's Appendix B. The February 28, 1992 order of the district court sustaining the demurrer was reproduced as Appendix C to the Petition for Writ of Certiorari, and is therefore not reproduced in this response. The demurrer of the Respondent which was sustained by the District Court of Custer County, Nebraska is reproduced as Respondent's Appendix C. The October 7, 1991 Order of the District Court of Custer County, Nebraska, which order was reproduced as Appendix B to the Petition for Writ of Certiorari, was not appealed to the Nebraska Supreme Court, and is therefore not germane to the Petition for Writ of Certiorari.

The only factual allegations reviewed by the Nebraska Supreme Court were those set forth in the Amended Petition. (Petitioner's Appendix D). Occasional embellishments of the "facts" in the Petition for Writ of Certiorari, such as the reference at pages 15-16 to allegations that "the Bar knew that its members were using its evaluation as a write-in libel of the petitioner," should be disregarded. Similarly, references to "facts which the bar has admitted in discovery" and any inferences drawn by Petitioner from discovery materials (see page 13 and pages 22-23 of the Petition for Writ of Certiorari) should be disregarded, as no discovery materials were reviewed by the district court or the Nebraska Supreme Court.

SUMMARY OF ARGUMENT

The Nebraska Supreme Court affirmed the dismissal of Petitioner's Amended Petition solely on the basis of Petitioner's failure to state a cause of action for defamation under Nebraska law. Although the Nebraska Supreme Court did not decide whether it was appropriate to recognize a privilege for the publication of judicial evaluation surveys, the availability of a privilege would also be decided as a matter of state law. Since the decision is based on state law, it is not an appropriate case for review by this Court.

Petitioner's allegations of deprivation of constitutional rights also fail to state a cause of action. The requisite elements of a cause of action for defamation were found to be lacking, so it was unnecessary for the Nebraska Supreme Court to determine whether any claim had been stated for an improper deprivation of constitutionally protected rights. This Court has previously determined, in any event, that a person's interest in his or her reputation is not a constitutionally protected property or liberty interest. The Amended Petition is also deficient under Nebraska procedural laws which require a plaintiff to plead facts rather than a theory of recovery or legal conclusions.

Petitioner's allegations regarding a right to a fair trial and a demand for an injunction also fail to set forth any recognized causes of action, and no authorities are presented to support and clarify Petitioner's theories underlying such allegations.

ARGUMENT IN OPPOSITION

I. No Federal Question is Raised by the Defamation Claim.

Rule 10 of the Supreme Court Rules specifies that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." With regard to appeals from a state court of last resort, the rule specifies the following reasons that will be considered:

> (b) when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; (c) when a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

The threshold question, therefore, becomes whether a federal question was decided by the Nebraska Supreme Court. The existence of a federal question is essential to the review of a state court decision. See *Illinois v. Rodriguez*, 110 S.Ct. 2793, 2798 (1990), in which the Court stated that "when a state court decision is clearly based on state law we will not review the decision."

The first question for review articulated by Petitioner on page 1 of his Petition for Writ of Certiorari is whether a cause of action for defamation was stated. Such a question, however, does not raise a federal question. "Generally speaking, the existence of tort remedies is a matter of state law. A state is free to create new causes of action and to abolish older ones." *Kranson v. Valley Crest Nursing Home*, 755 F.2d 46 (3d Cir. 1985). Thus, it is up to the State of Nebraska to determine whether it wishes to recognize a cause of action for defamation under facts such as those alleged by Petitioner in the lawsuit he filed in this matter.

Despite the frequent presence of First Amendment issues raised in defense to defamation actions, numerous decisions have characterized the question of whether a particular statement is defamatory as a question of state law. For example, in *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069, 1082-1083 (3d Cir. 1988), the Third Circuit considered whether a magazine article was defamatory, and recognized that "[t]o determine whether Times' article was defamatory per se, that is, whether it was incapable as a matter of law of any non-defamatory meaning, we therefore must apply New Jersey law . . . ." See also *Lavin v. New York News, Inc.*, 757 F.2d 1416 (3d Cir. 1985). Similarly, in *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072, 1077 (3d Cir. 1985), *cert. den.* 106 S.Ct. 182 (1985), the Third Circuit stated: "Although replete with First Amendment implications, a defamation suit fundamentally is a state cause of action."

The interplay between federal constitutional issues and state law questions in defamation cases was explained well in *McDowell v. Paiewonsky*, 769 F.2d 942 (3d Cir. 1985). In that case, the court noted that "in the first instance, the Court must determine whether the defendant has injured the plaintiff's reputation under the applicable state law. If so, then the Court must ascertain whether the First Amendment nevertheless prohibits the imposition of liability." *Id.* at 945. Thus, federal constitutional questions are not at issue in a defamation case unless it has first been determined that the plaintiff has suffered an injury to reputation that is otherwise actionable.

In the present case, the Nebraska Supreme Court reached its decision solely on the basis of its determination that the actions alleged were not defamatory and were therefore not actionable by Petitioner. The Nebraska Supreme Court noted that the "question of whether a particular publication is defamatory is, in the first instance, a question of law for the court." Petitioner's Appendix A, p. 69. The court applied a 'totality of the circumstances' test to examine the nature and full content of the communication and the knowledge and understanding of the audience to whom the publication was directed. The court observed that the Bar Association's survey

> was a compilation of attorneys' subjective ratings on each characteristic. As such, the rulings given him represented a collective subjective evaluation, which by its very nature ranged from well founded to utterly wrong. . . . Ratings by their very nature will reflect the philosophy of those doing the rating and are nothing more than expressions of subjective evaluations concerning a judicial candidate's qualification. There is simply no objective method to determine the rating an individual judge should receive in any given performance category; therefore, by their very subjective nature, ratings cannot imply a provably false factual assertion.

Petitioner's Appendix A, pp. 85-87.

The Nebraska Supreme Court also discussed the press release about which Petitioner complains so strenuously. Such release was issued to the news media of the State of Nebraska on May 2, 1990, approximately six months prior to the retention election and two months prior to release and publication of the summary of the bar survey. In the release, the Bar Association characterized the surveys as providing "solid information," and as giving each judge a "report card of his or her strengths and weaknesses." The Nebraska Supreme Court considered the context in which the characterization was made, and concluded it was a permitted exaggeration. The court also rejected Petitioner's complaints about the Bar Association's representation that, to assure valid results, lawyers must base their evaluation on recent, first-hand experience. The court said that such statement "merely describes the manner in which the bar association intended the lawyers to perform." Ultimately, the court concluded that "the judicial performance evaluation was, as a matter of law, not defamatory. Wheeler thus failed to state a defamation cause of action." Petitioner's Appendix A, pp. 87-88.

Petitioner argues that the Nebraska Supreme Court, in essence, granted the Nebraska State Bar Association an absolute immunity from liability with regard to its publication of judicial evaluation surveys. Respondent disagrees with this characterization of the Nebraska Supreme Court's decision, as the foregoing excerpts from the opinion merely demonstrate the court's assessment, under the totality of the circumstances, that the Bar Association's statements and publication of the survey results do not constitute the type of statements which can be considered defamatory. Nonetheless, it should be noted that it would have been well within the province of the Nebraska Supreme Court to recognize a privilege for the Bar Association as a matter of state law. (Indeed, Respondent argued to the Nebraska Supreme Court that a privilege for judicial evaluation surveys should be recognized because of the important public purpose they serve. Respondent's Appendix C, p. App. 4.) Recognition of such an immunity would not in any event raise a federal question appropriate for review by this Court, since the question of whether certain speech is protected by a privilege is also a question of state law. In *Warren v. Bank of Marion*, 618 F.Supp. 317 (D.C. N.J. 1985), the court explained that the law regarding privileges "is based on public policy protecting communications made in certain circumstances that might otherwise be actionable . . .", and that it "is well established that state law governs when the privilege defense is raised in a private individual defamation action." *Id.* at 324. In *Doe v. Doe*, 949 F.2d 736 (5th Cir. 1991), it was held that the definition of actual malice under Louisiana law was controlling in a defamation case, in light of the court's determination that the fair reporting privilege was a privilege created by state law. (The *Doe* court observed that the Louisiana common law definition of actual malice was narrower than the definition established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).)

A reporter's privilege created by Nevada statute was considered in *Laxalt v. McClatchy*, 116 F.R.D. 438 (D. Nev. 1987). The court observed that Nevada's privilege appeared to be the strongest of any such state enacted privileges, and that

> the legislature of the state of Nevada . . . has made clear by the enactment of §49.275 that there is no exception from this privilege in defamation cases. In so doing, it has decided that the confidentiality of new sources and the attendant benefit to the public, is a greater interest than the rights of an individual defamation plaintiff. Whereas constitutional consideration might force an exception to the rule in criminal prosecutions, there is no such constitutional implication in a defamation case.

Id. at 452 (citations omitted).

Even though the question of whether a petition states a cause of action for defamation is a question of state law, it should also be pointed out that the decision of the Nebraska Supreme Court in this case rests soundly on principles enunciated in *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695 (1990), *Letter Carriers v. Austin*, 95 S.Ct. 2770 (1974) and *Greenbelt Pub. Assn. v. Bresler*, 90 S.Ct. 1537 (1970). All of such cases are consistent with the Nebraska Supreme Court's approach of reviewing the allegedly libelous language in its broader context to assess whether a reader would have understood the statement to be a factual assertion.

II. No Cause of Action was Stated for Deprivation of Constitutional Due Process Rights.

The second question presented by Petitioner on page 1 of his Petition for Writ of Certiorari asks the Court to determine whether a cause of action was stated for deprivation of Petitioner's constitutional right to due process under the Fifth and Fourteenth Amendments. Petitioner's argument in support of his constitutional arguments is brief and fails to clearly articulate a legal theory in support of Petitioner's constitutional arguments. See pages 54 through 59 of the Petition for Writ of Certiorari.

Rule 14.5 of the Supreme Court Rules provides that "[t]he failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition." It should not be sufficient for Petitioner to make generalized and vague assertions of his legal rights without in some way supporting those assertions with proper legal authorities. See *Ellis v. Dixon*, 349 U.S. 458 (1955), in which a writ of certiorari was dismissed as having been improvidently granted, and the court commented: "What has been alleged is entirely too amorphous to permit adjudication of the constitutional issues asserted." *Id*. at 462.

Petitioner's constitutional argument seems to be that, if a person is treated "unfairly," there must be a constitutional violation for which there is a remedy. The only authority cited by Petitioner in support of his contention that he must have a remedy for what he views to be a deprivation of due process is *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990). The *Millman* decision, however, does not support the view that every wrong has a remedy under the law. *Millman* was a claim filed under Nebraska's Political Subdivisions Tort Claims Act. The district court concluded that it lacked subject matter jurisdiction due to the failure of the plaintiff to allege compliance with the statutory requirement that a tort claim be filed with the political subdivision prior to commencement of litigation. The Nebraska Supreme Court reversed, holding that the notice requirement was not an essential element of a negligence cause of action to be plead in the petition, but, rather, was a condition to filing a negligence suit against a political subdivision, which condition, in effect, would be waived if not raised by the defendant as an affirmative defense in an answer or by an appropriate demurrer. Thus, it was merely in this context that the Nebraska Supreme Court quoted from previous decisions, as follows: "A cause of action is judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that duty." In no way does the *Millman* decision support Petitioner's apparent view that Nebraska has recognized a cause of action for every perceived wrong.

Petitioner asserts without any supporting authorities that the "Civil Rights Act was passed to assure a remedy to people in the Petitioner's position." Petition for Writ of Certiorari, page 56. Presumably, Petitioner's reference to the "Civil Rights Act" is a reference to 42 U.S.C.A. §1983 (1981), but the precise basis for Petitioner's constitutional arguments is unclear. A review of the Amended Petition filed by Petitioner in this case reveals only two paragraphs which even remotely address any constitutional claim. Paragraph 43 of the Amended Petition states:

> That the defendant has through its libel taken from the plaintiff his good reputation in his profession and in his community without due process of law, which principle is the cornerstone of the legal profession which the defendant purports to lead in the State of Nebraska.

Paragraph 45 of the Amended Petition states:

> That the above-alleged actions of the defendant has deprived the plaintiff of his federal rights of procedural and substantive due process, to the damage of the plaintiff.

Petitioner's attempt to turn a state law defamation action into a federal constitutional question ignores the fact that libel cannot form the basis for a cause of action for violation of constitutional rights under 42 U.S.C. §1983 or any other cause of action for violation of federal or state constitutional due process rights. In order for a plaintiff to prevail under any such cause of action, he must have a constitutionally protected property or liberty right to which the Fourteenth Amendment's procedural due process protections would attach. *Board of Regents v. Roth*, 92 S.Ct. 2701 (1972). It has been well established that in order to properly state a cause of action for violation of due process rights, the plaintiff must allege more than merely claiming injury to good reputation. In *Paul v. Davis*, 96 S.Ct. 1155, 1165-1166 (1976), this Court held that a plaintiff's

> interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law . . . .

This Court has frequently observed that the property interests to be protected by due process are not created by the Constitution, but, rather, are created and defined by an independent source such as state law. *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985), *Goss v. Lopez*, 95 S.Ct. 729 (1975), *Board of Regents v. Roth*, 92 S.Ct. 2701 (1972). Similarly, it has been stated that the due process clause is not a guarantee of certain rights. "[I]t forbids the state itself to deprive individuals of life, liberty or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *Collins v. City of Harker Heights, Texas*, 112 S.Ct. 1061, 1069 (1992).

In *Wade v. Goodwin*, 843 F.2d 1150 (8th Cir. 1988), the claimant brought a §1983 action against the director of the Arkansas State Police, asserting claims of slander, denial of due process and equal protection, invasion of privacy, and chilling effect on exercise of his First Amendment rights of speech and association. In *Wade*, the director of the Arkansas State Police compiled and circulated a list of persons, including Mr. Wade, identified as "survivalists" which included members of the Ku Klux Klan and other similar organizations. The Eighth Circuit concluded that Mr. Wade was not denied any constitutional rights. The court stated:

> Wade's allegations, beyond general harm to reputation, were that "he will find it impossible to make a living or obtain loans or credit." These allegations do not state a § 1983 claim. One's reputation alone is neither a "liberty" nor a "property" interest protectable by the due process clause of the Fourteenth Amendment. . . . . Wade's claim of injury to his ability to make a living and obtain loans and credit, even if true, do not implicate any action by the State of Arkansas beyond a general injury to his reputation. . . . We believe that the injuries described by Wade are precisely the kind of injuries that the Supreme Court believed were protected against by state tort law rather than by the due process clause of the Fourteenth Amendment. *Paul v. Davis*, 424 U.S. at 711-712, 96 S.Ct. at 1165-66.

Id. at 1152. Wade's attorney had asserted that his client primarily wanted a "name clearing" hearing, but the court concluded:

> Perhaps, unfortunately, neither this court nor the district court has jurisdiction under §1983 to give Wade a name-clearing hearing. At bottom, his complaint alleges, if any cause a state tort action for defamation of character. Thus, we have no choice other than to deny relief here.

Id. at 1153.

In the case of *Gorman v. Lukowsky*, 431 F.2d 971 (6th Cir. 1970), the Sixth Circuit dealt with a §1983 claim with facts which are very similar to the case at bar. In *Gorman*, the claimant was an attorney who was defeated in an election for a circuit court judgeship in Kenton County, Kentucky. The defendants included the incumbent judge who defeated Gorman and three attorneys who served on the incumbent judge's election campaign committee, along with the president and certain officers of the Kenton County Bar Association. Gorman alleged that the defendants conducted a poll among the members of the Kenton County Bar Association concerning the qualifications of Gorman and the incumbent judge. The results of the poll were highly unfavorable to Gorman. The poll included information that indicated that according to the opinions of the attorneys practicing in Kenton County, Gorman's legal knowledge rated a 5% as compared to 95% given to the incumbent judge. After this poll was completed, the defendants had the results of the poll published in two large advertisements in the local newspapers. Gorman later alleged that the results of the poll and the advertisement falsely portrayed him as lacking the qualifications for the office of judge, and that the defendants defamed his character, reputation, and good name in the community. The Sixth Circuit concluded that Gorman had failed to state a proper cause of action under §1983, and that the suit was essentially an action for libel. *Id.* at 972.

The Nebraska Supreme Court determined it was unnecessary to determine Petitioner's separate constitutional claims because of its determination that Petitioner had failed to state a cause of action for defamation. Petitioner's Appendix A, p. 88. Dismissal of the constitutional claims could also have been justified on the grounds of lack of specificity in the pleadings. The Amended Petition fails to plead several essential elements under §1983. Mere conclusory allegations are not enough. *Streetman v. Jordan*, 918 F.2d 555 (5th Cir. 1990), *Hall v. Bellman*, 935 F.2d 1106, 1113 (10th Cir. 1991). Civil rights claims must be plead with some particularity before a plaintiff is allowed to subject the defendant to burdensome discovery and litigation. *Id.*

For example, in order to properly state a claim under §1983, a complaint must allege that the deprivation of a right occurred through the conduct of a person acting "under color of state law." *Morton v. Becker*, 793 F.2d 185 (8th Cir. 1985). Liability attaches only to those wrongdoers "who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, 365 U.S. 167, 172 (1961), rev. on other grounds *Monell v. Dept. of Social*

Services, 436 U.S. 658, 663 (1977). The Petitioner's Amended Petition contains no such language. The only arguable nexus that the Amended Petition makes between the Bar Association and state action is found in paragraph 2 where it is alleged that the Nebraska State Bar Association is an association organized and administered by the Supreme Court of the State of Nebraska. Merely alleging that the Respondent is an association organized and administered by the Supreme Court of the State of Nebraska is not a sufficient nexus to establish that the NSBA was acting under color of state law. See *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179 (1988), holding that the National Collegiate Athletic Association was not acting under color of state law and was not acting as the agent of the University of Nevada at Las Vegas when it recommended sanctions against UNLV if it failed to discipline Tarkanian. See also *Keating v. Martin*, 638 F.2d 1121 (8th Cir. 1980) (in which the Eighth Circuit found that an official with the Missouri Bar Association was not acting under color of state law when he initiated disbarment proceedings); and *Niehaus v. Kansas Bar Association*, 793 F.2d 1159 (10th Cir. 1986) (in which two employees whose employment was terminated by the Kansas State Bar Association brought suit against the Kansas Bar Association alleging in part that the termination was in violation of their §1983 rights based upon the First and Fourteenth Amendments, and the Tenth Circuit found the element of state action to be lacking).

The Amended Petition is further deficient in that it fails to assert facts that could support a reasonable inference that there is a causal connection between the alleged deprivation and the challenged conduct. An inability to make this reasonable inference will be cause for dismissal. *Morton v. Becker, supra; Chapman v. Musich*, 726 F.2d 405, 407 (8th Cir. 1984). As set forth in the Amended Petition, the alleged deprivation relates only to Petitioner's reputation. Even if Petitioner's claim is construed more broadly to allege the loss of his job as a judge, it must be emphasized that Petitioner's job security depended on the whims of the voters. Since it is the public who voted to remove Petitioner from the bench and it is impossible to determine what was in the minds of the voters, there is no reasonable inference that the court could draw to conclude that the due process claims set forth in paragraphs 43 and 45 of the Amended Petition had any logical nexus to the outcome of the retention election.

The dismissal of Petitioner's purported cause of action for deprivation of constitutional rights is appropriate under the requirements of Nebraska procedural law. "Under the Nebraska system of code pleading, the plaintiff is required to plead the facts, not the theory of recovery. The pleading of legal conclusions is insufficient to raise an issue of fact." *Newman Grove Creamery v. Deaver*, 208 Neb. 178, 182, 302 N.W.2d 697, 700 (1981) (citations omitted); *Neb. Rev. Stat.* §25-804 (Reissue 1989).

III. No Cause of Action Was Stated for Deprivation of a Constitutional Right to a Fair Trial.

The third question presented by Petitioner is whether a cause of action was stated for deprivation of Petitioner's constitutional right to a fair trial. At no place in the Amended Petition did Petitioner allege that the Bar

Association had deprived him of a federal or state constitutional right to a fair trial, nor did he make mention of any such right, so it is unnecessary to consider his current contention that such a cause of action was alleged. Furthermore, Petitioner does not seem to be saying that he has actually been deprived of a right to trial, but merely that one effect of the Nebraska Supreme Court's decision is that future litigants might be deprived of fairness in their trials. Such an allegation does not represent an actual case or controversy, is not supported by any legal authorities, and is so remote and speculative that it should not merit further consideration. See also Sup. Ct. R. 14.5 and *Ellis v. Dixon*, supra.

IV. No Cause of Action for Injunction Was Stated.

The final question presented for review by Petitioner is whether his petition stated a cause of action for "injunction." See page 1 of Petition for Writ of Certiorari. This question, and the two-sentence argument advanced in support of the contention that a cause of action for injunction was stated (see page 59 of Petition for Writ of Certiorari) suffer from the same lack of clarity and detail discussed above with regard to Petitioner's constitutional arguments. Since an injunction is a remedy to be awarded in appropriate circumstances, as opposed to a separate cause of action, it is difficult to follow Petitioner's argument in this regard. In any event, the existence of such a cause of action and the Nebraska Supreme Court's ruling with regard thereto would appear to be solely a matter of state law, and is not an appropriate question for review in this proceeding.

CONCLUSION

The determination that the allegations set forth in Petitioner's Amended Petition failed to make out a cause of action for defamation was decided by the Nebraska Supreme Court based on state law, and is therefore not appropriate for review in this case. The Nebraska Supreme Court also determined that no cause of action had been stated for the deprivation of constitutional rights, and the Nebraska Supreme Court's decision in this regard is in full accord with decided opinions of this Court and other federal courts, and is appropriate under Nebraska procedural law.

Accordingly, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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RESPONDENT'S APPENDIX A

IN THE DISTRICT COURT
OF CUSTER COUNTY, NEBRASKA

ROBERT E. WHEELER, Plaintiff, v. NEBRASKA STATE BAR ASSOCIATION, Defendant.	)	CASE NO. 3022 **ORDER** (Filed March 20, 1992)

NOW ON THIS 20th day of March, 1992, this matter comes before the Court. The Court finds that the Plaintiff has filed a notice to stand on his Amended Petition. Therefore, pursuant to the prior Order of this Court, the Court finds that the Amended Petition should be dismissed, without prejudice, at Plaintiff's costs.

SO ORDERED.

BY THE COURT:

/s/ John P. Murphy
John P. Murphy
District Judge

RESPONDENT'S APPENDIX B

IN THE DISTRICT COURT OF CUSTER COUNTY, NEBRASKA

ROBERT E. WHEELER	)	Docket 61 Page 132
	)	Case No. 3022
Plaintiff,	)	
	)	
v.	)	ELECTION TO
	)	STAND ON
NEBRASKA STATE BAR	)	AMENDED PETITION
ASSOCIATION,	)	
	)	(Filed
Defendant.	)	March 5, 1992)

COMES NOW the plaintiff and elects to stand on his amended petition, without further amendment.

Dated March 4, 1992

ROBERT E. WHEELER, Plaintiff

/s/ Robert E. Wheeler
By Robert E. Wheeler
Attorney at Law
511 No. 10th Ave
Broken Bow, NE 68822
Phone No. (308) 872-2823

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed a copy of the above pleading in the United States mail, postage prepaid, this 5th day of March, 1992, addressed to:

James A. Snowden, Attorney at Law, 1000 NBC Center, Lincoln, NE 68508

Hon. John P. Murphy, 301 N. Jeffers, North Platte, NE 69103-3931.

/s/ Robert E. Wheeler

LITIGATE\BARSUI13.DOC

RESPONDENT'S APPENDIX C

IN THE DISTRICT COURT
OF CUSTER COUNTY, NEBRASKA

ROBERT E. WHEELER) Docket 61 Page 132
) Case No. 3022
Plaintiff,)
)
v.) DEMURRER TO
) AMENDED PETITION
NEBRASKA STATE BAR)
ASSOCIATION,) (Filed
) October 11, 1991)
Defendant.)

The defendant, Nebraska State Bar Association, hereby demurs to the Amended Petition of the Plaintiff for the reasons that:

1. It fails to state facts sufficient to state a cause of action; and

2. The Petition shows on its face that the alleged defamatory publication is not susceptible to a defamatory construction; and

3. That the publication complained of is not actionable for the reason it is absolutely privileged and that the defendant is entitled to immunity from suit.

NEBRASKA STATE BAR
ASSOCIATION, Defendant

By: KNUDSEN, BERKHEIMER,
RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68508
(402) 475-7011

/s/ By: James A. Snowden
James A. Snowden - #13927
One of Said Attorneys

NOTICE OF HEARING

TO: Robert E. Wheeler, Plaintiff:

You are hereby notified that the defendant will call the foregoing Demurrer for hearing in the District Court of Broken Bow County, Nebraska, before Judge John Murphy on the 29th day of November, 1991, at 10:00 a.m. or as soon thereafter as the same may be conveniently heard by the Court, and you are notified to govern yourself accordingly.

DATED this 11th day of October, 1991.

/s/ By: James A. Snowden
James A. Snowden

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing **Demurrer to Amended Petition** to be served on Robert E. Wheeler, Attorney at Law, 511 No. 10th Avenue, Broken Bow, Nebraska 68822 by First Class United States mail, sufficient postage prepaid on this 11 day of October, 1991.

/s/ James A. Snowden
James A. Snowden
